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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1315

MAJOR LEO D. DOYLE, ET AL.,
Petitioners.

v.

THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioners, Major Leo D. Doyle, Major Louis Gaddini, Major John D. Gardner, Major Bobby Eugene Hill, Major Eldon Craig Loe, Major Robert W. Mandelstam, Major Lois Martin, Major William J. Riddel, Major James H. Robar, Major L. D. Truitt, Major Charles M. Tryon, Jr. and Major Kenneth P. Winchester, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Claims, sitting *en banc,* entered in this proceeding on May 16, 1979.*

OPINION BELOW

The opinion of the United States Court of Claims is reported in 220 Ct. Cl. (1979) and 599 F.2d 984 (Ct. Cl. 1979).

* No Petition is filed in the related case of *Adams v. United States*, which was consolidated for hearing with *Doyle*. (Ct. Cl. No. 275-77)

JURISDICTION

The judgment of the United States Court of Claims was entered on May 16, 1979. A timely motion for rehearing and clarification was granted in part on September 28, 1979. The opinion was again modified upon timely motion on November 30, 1979. *See*, 609 F.2d 990. Petitioners out of caution requested this Court to extend the time for filing a petition for writ of certiorari to and including February 25, 1980, which request was granted by order of this Court dated December 21, 1979. This Court's jurisdiction is invoked under 28 U.S.C. § 1255(1).

QUESTIONS PRESENTED

I. Whether Petitioners, Reserve Army officers, can be released from active commissioned service by reason of not being selected for promotion by two Promotion Selection Boards pursuant to Army Regulation 635-100 where:

(a) the original Promotion Selection Boards which considered these officers for promotion did not have Reserve officer membership in direct violation of 10 U.S.C. § 266, 10 U.S.C. § 277, 10 U.S.C. § 3442 and Army Regulation 624-100, Section III, ¶ 16(b) (5); and

(b) following Petitioners administrative challenge to the validity of the original Selection Boards and their resulting release, the Secretary of the Army established *ex parte* "evidentiary proceedings" in the form of "reconstituted" selection boards to reconsider Petitioners under the original promotion criteria with Reserve membership to determine whether Petitioners had in fact been "harmed" by the absence of Reserve officers on the original Selection Boards; and

(c) the *ex parte* "evidentiary proceedings" were not in fact conducted under the original promotion criteria thereby diminishing Petitioners' opportunity for selection

in violation of 10 U.S.C. § 277, 10 U.S.C. § 3442 and Army Regulation 624-100, Section IV, ¶ 23.

II. Whether the Court of Claims can *sua sponte* forfeit Petitioners' right to judicial review of the manner in which *ex parte* administrative proceedings were conducted by reason of Petitioners' failure to complain to the Secretary prior to the commencement of those proceedings where:

(a) Petitioners had no knowledge of the manner in which they were being conducted until they were substantially complete; and

(b) Petitioners were unaware prior to the conclusion of those proceedings that the results would materially effect their substantial statutory and regulatory rights; and

(c) the Secretary of the Army agreed that Petitioners had exhausted all administrative remedies and that Petitioners' challenge to the validity of the defective "evidentiary proceedings" was properly before the Court for resolution.

III. Whether, under the circumstances, the Court of Claims decision amounts to a refusal to enforce the mandates of 10 U.S.C. § 266, § 277, and § 3442 that Reserve officers in the military services of the United States will not be discriminated against in the selection of officers for promotion and that they are entitled to be considered for promotion on a fair and equitable basis.

IV. Whether Petitioners have been properly released from active duty where:

(a) both the original Selection Boards and the "evidentiary proceedings" granted 15% of the available promotion vacancies to junior officers in violation of AR 624-100, Section IV, ¶ 23; and

(b) where virtually all of those promotions to junior officers were granted to Regular officers; and

(c) the Secretary relies upon written policy statements as implied changes to the regulations which were never incorporated into the regulations by later changes.

V. Whether Petitioners have been properly released from active commissioned service where:

(a) the original Selection Boards, and subsequent "evidentiary proceedings" did not make factual findings that were required by Army Regulations 624-100 and 635-100 to authorize a release from active commissioned service; and

(b) the Secretary, after the original Selection Boards were completed and upon complaint by affected officers, retroactively changed the regulation to eliminate the necessity of those factual findings to support a release from active commissioned service so as to validate Petitioners' release from active service.

STATUTES AND REGULATIONS INVOLVED

United States Code, Title 10:

§ 266(a). Boards For Appointment, Promotion, And Certain Other Purposes; Composition

Each Board convened for the appointment, promotion, demotion, involuntary release from active duty, discharge, or retirement of Reserves shall include an appropriate number of Reserves, as prescribed by the Secretary concerned under standards and policies prescribed by the Secretary of Defense.

Aug. 10, 1956, c1041, 70A Stat. 11.

§ 277. Regular And Reserve Components: Discrimination Prohibited

Laws applying to both Regulars and Reserves shall be administered without discrimination—

(1) among Regulars;

(2) among Reserves; and

(3) between Regulars and Reserves.

Aug. 10, 1956, c1041, 70A Stat. 14.

§ 3442(c) Commissioned Officers; regular and reserve components; Appointment In Higher Grade.

Subject to subsections (a) and (b), a Regular commissioned officer, or a Reserve commissioned officer who is serving on active duty, may be appointed in a temporary grade that is equal to or higher than his Regular or Reserve grade, without vacating any other grade held by him. Under regulations to be prescribed by the Secretary, appointments made under this subsection shall be made on a fair and equitable basis. Selections shall be based upon ability and efficiency with regard being given to seniority and age. Aug. 10, 1956, c. 1041, 70A Stat. 195.

Department of Defense Directives:

Department Directive 1205.4; Inclusion Of Reservists On Boards Considering Members Of Reserve Components Under § 266 Of Title 10 U.S.C. (See Appendix 1a).

Army Regulations:

Army Regulation 624-100, Promotion of Officers on Active Duty;

Section III, ¶ 16(b)(5)

Whenever a zone of consideration includes non-Regular officers, selection boards will, where

practicable, include at least one officer of the Reserve components.

Section I, ¶ 1 and 2(a)-(h) (Appendix at 3a).

Section IV, ¶ 22-23, 25 (Appendix at 4a).

Army Regulation 635-100, Section XVII, ¶ 3-65(a)-(d), Personnel Separations, Officer Personnel; (Appendix at).

Army Regulation 15-185; Boards, Commissions, and Committees, Army Board for Correction of Military Records, ¶ 9;

Other Proceedings Not Stayed. The application to the Board for correction of a record will not operate as a stay of proceedings being taken with respect to the person involved.

STATEMENT OF THE CASE

Petitioners are United States Army Reserve officers who were released from active commissioned service by reason of not being selected for promotion in 1974 and 1975 by Department of the Army Promotion Selection Boards.[1] Appendix at 47a. The Selection Boards that did not select Petitioners failed to contain Reserve officer membership as required by Title 10 U.S.C. § 266 and Army Regulation (AR) 624-100. (Appendix at 52a). Petitioners filed applications with the Army Board for Correction of Military Records (ABCMR) challenging the validity of the action of the Selection Boards and Petitioners' resulting release from active commissioned service. The ABCMR found that the absence of Reserve officer membership on the Selection Boards was an "injustice" and deprived Petitioners of consideration in the manner intended. (Appendix at 38a).

[1] Petitioners were non-selected by Promotion Boards which convened on or about March 26, 1974 and April 8, 1975.

Upon recommendation from the ABCMR, the Secretary of the Army convened "Reconstituted" Selection Boards to reconsider Petitioners for promotion and to report their findings to the ABCMR for such administrative action as the ABCMR might deem appropriate. (Appendix at 40a). After the 1974 Reconstituted Selection Boards were substantially complete, Petitioners discovered that the manner in which those boards were conducted was not in accordance with law and regulation.

After the Reconstituted Selection Boards' results were provided to the ABCMR, the ABCMR determined that since Petitioners had not been favorably considered that the absence of Reserve officers on the original Selection Boards was "harmless error" and, therefore, Petitioners' original non-selections were neither erroneous nor unjust. (Appendix at 45a).

Petitioners filed suit in the Court of Claims challenging Petitioners' original non-selections and the action taken by the ABCMR.

Administrative Proceedings

In the Fall of 1975, Petitioners filed applications for correction of their military records with the ABCMR,[2] requesting, *inter alia,* voiding of their failure of selection for promotion to the next higher grade, appropriate correction of their records and reinstatement to active service. Petitioners challenged the validity of the actions of the 1974 and 1975 Selection Boards and their resulting

[2] Over 1,300 applications were filed before the ABCMR by officers similarly situated as Petitioners.

Three "lead" applications were filed and fully briefed which controlled the ABCMR's decisions on any later applications filed raising the same issues. As a result of being denied relief, officers similarly situated filed various suits. There are presently at least 38 pending cases in the United States Court of Claims involving in excess of 100 Reserve officers which have been suspended pending this Court's determination in this case.

release from active commissioned service because (1) there was no Reserve membership on the 1974 and 1975 Selection Boards contrary to 10 U.S.C. §§ 266, 277 and 3442, Department of Defense Directive at 1205.4 and Army Regulation 624-100; (2) that the percentage of selections from the secondary zone was unlawful and in violation of Army Regulation 624-100 and finally;[3] (3) that the Selection Boards in question failed to make the proper factual findings as required by Army Regulations 624-100 and 635-100 in that Petitioners were not found to be not fully qualified to assume the responsibilities expected of the next higher grade.[4]

The ABCMR granted Petitioners a hearing on December 10, 1975 where applicants were allowed to present testimony and other evidence.[5] Subsequent to the hearing, the ABCMR rendered its decision finding that there were no Reserve officer members on the Selection Boards in question and that it was practicable to have Reserve officer membership on those boards. In light of these

[3] AR 624-100, ¶ 22-23 as published at the time of Petitioners' original non-selections authorized only a 7.5% secondary zone selection. The original Selection Boards granted 15% of the available promotion vacancies to the members of the secondary zone. Each secondary zone selection effectively deletes a vacancy from a member of the primary zone. Petitioners were members of the primary zone. Appendix at 49-50a, 67-68a.

[4] If an officer is found "fully qualified" for promotion but not selected, such a determination is not a passover for separation under the two passover rule. (Appendix at 3a, 6a, 73a).

[5] In spite of the Secretary's knowledge of the defect in the composition of the Selection Boards (and the other defects alleged by Petitioners), he refused to retain the Petitioners, and others similarly situated, on active duty until the ABCMR decided the controversy. On October 29, 1975 the Secretary ordered all Army units to continue discharge processing of affected officers. The ABCMR's hearing was at that time scheduled for December 10, 1975. The Secretary grounded his decision on the fact that AR 15-185, ¶ 9 states that ABCMR action does not operate to "stay other personnel actions". Attachment D, Plaintiffs' Stipulation of Fact. Accordingly, Petitioners were released from active duty.

findings, the ABCMR found that Petitioners might have been deprived of consideration in the manner intended in that:

> ". . . although the [Petitioners] have not shown that they have been harmed because there was no Reserve officer on the Boards, the failure to have a Reserve officer as a member of the Selection Board raises some doubt as to whether the [Petitioners] were accorded proper consideration for promotion under the 1974 and 1975 promotion criterion." (See Appendix at 38a).

The ABCMR then recommended to the Secretary that "Reconstituted" Selection Boards be convened to reconsider all officers who were originally eligible in the primary zone and that:

> ". . . the letter orders of instruction and guidance pertaining to the primary zone previously furnished the original 1974 and 1975 Selection Boards be utilized as the criterion for consideration and selection." See Appendix at 39a.

The names of officers selected and not selected by these Reconstituted Selection Boards were to be reported back to the ABCMR for further administrative action in connection with those who had filed applications. (Appendix at 39-40a).

On January 27, 1976 the Secretary approved the findings, conclusions and recommendations of the ABCMR and issued a directive to the Chief of Staff to convene Reconstituted Selection Boards in accordance with the recommendations of the ABCMR and stating:

> ". . . that the letter orders of instruction and guidance pertaining to the primary zone previously furnished the original 1974 and 1975 Selection Boards be utilized as the criterion for consideration and selection." (Appendix at 40-41a).

Consistent with the findings of the ABCMR, the Secretary's directive indicated merely that the names of those

selected and non-selected by the Reconstituted Selection Boards would be reported to the ABCMR for appropriate administrative action, but did not otherwise indicate the effect of a selection or non-selection by these Reconstituted boards. The Secretary's implementing memorandum was silent on Petitioners' request to have their records corrected to eliminate their original non-selections and for reinstatement to active duty. Petitioners were not recalled to active duty. (Appendix at 40a).

The Secretary did not convene the Reconstituted Selection Boards as duly constituted statutory selection boards pursuant to 10 U.S.C. § 3442 and Army Regulation 624-100 with power to non-select an officer for purposes of discharge from active duty.[6] The Secretary viewed the Reconstituted Selection Boards as "merely an evidentiary proceeding into the question of harmless error" to assist the ABCMR and the Secretary in a final disposition of the case. Appendix at 66a; Defendant's Reply to Plaintiffs' Cross-Motion for Summary Judgment at 5-6, 16; Defendants Response to Plaintiffs' Motion for Rehearing.

The "letter orders of instruction and guidance" used in operating the 1974 and 1975 Reconstituted Selection Boards established the "ground rules" for the operation of the boards governing, *inter alia*, the selection method to be used; numbers to be selected; the number that can be selected in the primary zone and the authorized number which the Selection Boards *in their discretion* can select. The original letter to the Lieutenant Colonels Board provided that a maximum of 3,266 primary zone officers could be selected for promotion. The letter of instruction that was given to the Reconstituted Selection Boards deleted secondary zone vanacies from the total promotion

[6] The Reconstituted Selection Boards were not viewed as substituted boards *in place of* the original boards since all officers previously promoted were to keep their promotions.

slots available and allowed only 2,806 promotions.[7] The original 1974 and 1975 Selection Boards had selected a full 15% of secondary zone officers[8] for promotion. Virtually all of these officers selected in the secondary zone by the original Selection Boards which contained no Reserve officer membership were Regular officers.[9] The Reconstituted Selection Boards deprived Petitioners of the opportunity to compete for 460 promotion vacancies before selection boards with Reserve membership contrary to 10 U.S.C. § 277 and 10 U.S.C. § 3442.

The Reconstituted Selection Boards proceedings were *ex parte*. Petitioners were not provided with a copy of the letter of instruction and guidance prior to the convening of those boards. Nor were they specifically advised as to when the Reconstituted Selection Boards would convene. Upon learning that the Reconstituted Selection Boards had convened, Petitioners on April 9, 1976 requested copies of the letters of instruction and the names of the members sitting on each Reconstituted Selection Board. By reply dated May 3, 1976, the Department of the Army provided Petitioners with copies of the instructions that had been provided to the 1974 Reconstituted Selection Boards. Plaintiffs' Motion for Rehearing and Clarification of Opinion, Attachment B. At the time of receipt of the

[7] Attachments I and N, Plaintiffs' Statement of Fact. Letters of instructions to the other Reconstituted Boards contained the same percentage deletion of secondary zone vacancies. Attachment I and N to Plaintiff's statement of facts in *Adams*.

[8] The maximum number authorized by the Secretary's original letter of instruction.

[9] 98.6% of the secondary zone selections before the 1974 Lieutenant Colonels Boards and 87.4% of the secondary zone selections before the 1974 Majors Boards went to Regular officers. In 1975, the Lieutenant Colonels Boards gave 100% of their secondary zone selections to Regular officers and the Majors Boards gave 81% of their secondary zone selections to Regular officers. *See*, Plaintiffs' Statement of Facts, ¶¶ 21 and 22.

letters of instruction, the 1974 Temporary Majors and Warrant Officers Reconstituted Selection Boards had already been completed and the 1974 Lieutenant Colonels Board was in progress.[10]

It was only after the ABCMR met following the completion of all of the Reconstituted Selection Boards in the Fall of 1976, that any statement was given to Petitioners that a non-selected officer would be given no relief. Plaintiffs' Motion for Rehearing, p. 10, fn. 11. The ABCMR denied Petitioners' applications for correction of their records and found:

> "That the [Petitioners'] records having been reconstituted in a manner prescribed by the Secretary having been reviewed by properly reconstituted . . . Promotion Boards under the primary zone of the 1974 and 1975 criteria, it is reasonable to presume that had they been considered by properly constituted boards, they would not have been selected for promotion at the time concerned under the 'best qualified' method.
>
> * * * * * *
>
> In consideration of the foregoing findings and conclusions, the [Petitioners'] non-selections for promotion . . . under the 1974 and 1975 . . . selection criteria are neither erroneous nor unjust." Appendix at 45-46a.

[10] The Court of Claims opinion erroneously states that the Reconstituted 1974 and 1975 Selection Boards convened from May, 1976 through August, 1976. (Appendix at 54a). The Reconstituted Selection Boards schedule actually was as follows: 1974 Majors Boards for AMEDD and APL convened on March 30, 1976 and April 13, 1976, respectively; the Chief Warrant Officers W-3 and W-4 Boards convened on April 6, 1976 and the Lieutenant Colonels Boards convened on May 4, 1976. The 1975 Boards convened as to Chief Warrant Officers W-3 and W-4 on June 8, 1976; as to Majors on July 13, 1976 and as to Lieutenant Colonels AMEDD and APL on September 14, 1976 and August 24, 1976, respectively. See letters of instructions, Attachment B, Plaintiffs' Motion for Rehearing and Attachment N, Plaintiffs' Statement of Facts in Adams and Doyle.

The absence of Reserve officers on the original Selection Boards was therefore viewed as "harmless error" and Petitioners' release from active duty in the Fall of 1975 was retroactively validated.

The ABCMR also found that the establishment of secondary zone selection rates in a larger number than that established by AR 624-100, ¶ 22-23 was justified by the existence since 1972 of written policy allowing the higher rates. With respect to the May, 1975 retroactive change to AR 635-100, the ABCMR found that the May, 1975 amendment did not serve to operate retroactively since:

> ". . . such messages merely clarified and confirmed the longstanding Departmental approved policy, that an officer who was not selected (recommended) for temporary promotion to the next higher grade would have such non-selection counted towards separation, elimination or removal from active duty as appropriate . . . ." Appendix at 36a.

Proceedings Before United States Court of Claims

Following the denial of their applications for correction of military records, Petitioners filed suit in the United States Court of Claims seeking backpay and allowances from their date of release and other relief on grounds that, *inter alia*, the requirement imposed upon Petitioners by the ABCMR to prove that they were harmed by the defective composition of the original Selection Boards and the attempted retroactive validation of the original Selection Boards was contrary to law.[11] Respondent conceded

[11] Included in this argument was Petitioners' contention that the Reconstituted Selection Boards did not accurately reflect what would have happened before the original Selection Boards because Petitioners were not given the opportunity to compete for those vacancies previously given to members of the secondary zone. Respondent did not plead or otherwise raise any defense based upon Petitioners' failure to notify the secretary of the defect in the "evidentiary proceedings".

that Petitioners had exhausted all available administrative remedies. See, Petition and Answer thereto, ¶ 19 and Plaintiffs' Statement of Facts Not in Dispute, ¶ 42 and Defendant's Response. The parties submitted the matter to the Court of Claims on Cross-Motions for Summary Judgment.

Throughout the litigation Respondent maintained that the Reconstituted Selection Boards were not "new" Promotion Boards that could independently support a release from active duty, but rather mere "evidentiary proceedings" into the question of "harmless error" ancillary to the ABCMR's consideration of Petitioners' applications. Appendix at 62a, 66a; Brief in Support of Plaintiffs' Motion for Summary Judgment, note 4; Defindant's Reply to Plaintiffs' Response to Defendant's Cross-Motion for Summary Judgment, p. 5-6, 16, Defendant's response to Plaintiffs' motion for rehearing. The case was briefed and argued on that issue.[12]

The Court of Claims rejected the ABCMR's finding of "harmless error" and held that Petitioners have suffered a serious violation of their legal rights (Appendix at 65a), finding that the absence of Reservists on the original Selection Boards frustrated the Congressional intent to eliminate conscious or unconscious bias against Reserves. The Court stated:

> "We reaffirm our holding in *Sanders v. United States* [594 F.2d 804 (1979)] that an officer cannot be

[12] The case was consolidated with Adams v. United States, Court of Claims No. 275-77. The only factual difference between Adams and Doyle is that the plaintiffs in Adams contained officers of all ranks, all of whom would have reached 18 years active service prior to the completion of the Reconstituted Selection Boards if they had been retained on active service in the Fall of 1975. By reason of the constructive active duty ordered by the United States Court of Claims, all of the plaintiffs in Adams are entitled to be placed on the retirement roles together with an award of backpay and allowances. Appendix at 78a.

> terminated under the two passover rule unless he had had two fair chances at promotion as required by statute and regulation. This includes, in this case, consideration by boards which are constituted squarely in accordance with statute and regulation. This we deem to be an officer's basic right. Where the error is in the violation of a provision designed to protect against a general form of prejudice, and there is no way of determining whether actual prejudice was involved in highly subjective and secret decisionmaking, we conclude that this right was not had. Thus, we hold that [Petitioners], separations, predicated on two passovers by illegally constituted boards were invalid. These [Petitioners] were entitled to their position, rank and pay until they were terminated from active duty under proper authority." (Appendix at 65a).[13]

The Court, however, rejected the Respondent's position which had been consistently taken in the briefs and in oral argument that the Reconstituted Selection Boards were mere "evidentiary proceedings" into the question of harmless error:

> "[Respondent] has taken the extreme position that the reconstituted boards were merely an evidentiary proceeding into the question of harmless error and has failed to consider any other. We feel that this uncompromising attitude jeopardizes the best interest of the government. Nor do we believe the facts support defendant's narrow reading of them." Appendix at 66a.

Noting that the Reconstituted Selection Boards followed the standards and procedures of the original Selection Boards with *one exception,* the Court of Claims acknowledged that the Reconstituted Selection Boards did not completely *redo* the job of the original defective Selection Boards:

> "Since the reconstituted boards were instructed to and did consider only officers from the primary zone, the

[13] A dissenting opinion was filed by Chief Judge Friedman wherein he expressed the view that the absence of Reservists on the original 1974 and 1975 Selection Boards was harmless error.

total number of officers those Boards were to select was reduced by the number of secondary zone officers the original Boards had selected. Plaintiffs allege that this change in the number of officers the reconstituted boards would select improperly impinged upon the discretion of Selection Boards to select less than the maximum permissible number from the secondary zone, and thereby improperly reduced the number of places for which the plaintiffs were competing and that this disparity between the original and reconstituted boards meant that they did not have a fair opportunity to be promoted." (Appendix at 68a).

Absent from the Court of Claims' opinion is the fact that virtually all of the secondary zone selections given by the original Selection Boards without Reserve officer members were awarded to the Regular officers. Further, the Court of Claims opinion does not acknowledge that accurate reconsideration of officers in the primary zone in symmetry with Petitioners' original consideration would not involve a *reconsideration* for *promotion* of officers in the secondary zone,[14] but would involve a *comparison* of their files to officers in the primary zone that would otherwise have been promoted.

The Court of Claims concluded that notwithstanding the Secretary's directive that Petitioners be reconsidered by the Reconstituted Selection Boards under the "same letter orders of instruction and guidance which pertain to the primary zone previously furnished the original 1974 and 1975 Selection Boards" that Petitioners should have known from that directive that they would not *in fact* be considered under the same instructions and that they would be competing for 15% less promotion vacancies. The

[14] No secondary zone officer had filed a complaint with the ABCMR. Officers in the secondary zone who had been promoted would not be reconsidered for promotion since the ABCMR and Secretary concluded that officers who had been previously promoted by the original Selection Boards would not have their promotions affected.

Court of Claims assumed that the Petitioners were aware (although they had never been advised) that the ultimate decision of the Secretary and ABCMR after actions taken by the Reconstituted Selection Boards would be to retroactively validate their original release from active duty:

> "Since only officers in the primary zone had applied for correction, and since only these officers were in the situation that passovers resulted in release from active duty, it is understandable that the Correction Board addressed its remedy only to these individuals . . . what we find determinative is that plaintiffs were aware from the Correction Board's decision that *only officers in the primary zone would be reconsidered*. No objection was made to the Correction Board or to the Court concerning the manner of reconsideration until the reconstituted Selection Boards had not recommended the selection of these officers. . . . We are convinced that at that time plaintiffs were well satisfied with that part of the remedy which gave them the opportunity to be reconsidered by new Selection Boards for promotion retroactive to the action of the original Selection Boards. We conclude that under these circumstances, plaintiffs have waived any objection to the manner in which the new boards considered only primary zone officers when they were well aware of the fact and chose not to raise the objection until after they found out that they were not recommended for promotion by the Reconstituted Boards." (emphasis the Court).[15] (Appendix at 69-70a).

[15] The Court also commented upon the filing of the Adams case on April 13, 1976 before any action was taken by the Reconstituted Selection Boards. (Appendix at 69-70a). In fact, most of the Reconstituted Selection Boards of 1974 had been completed by that date, but the Court found it significant that Petitioners did not raise the deduction of 15% selection vacancies in that suit. As explained to the Court on motion for rehearing, Petitioners were not aware of the deduction of the 15% until subsequent to May 3, 1976, well after suit was filed and moreover, all of the plaintiffs in the Adams case would reach 18 years service and would therefore not be subject to discharge prior to the time the Reconstituted Selection Boards could act so that there was no purpose in challenging the

After commenting upon familiar law that a party cannot raise issues on appeal to a Court when it fails to raise the issues before an administrative agency competent to hear it in cases dealing with exhaustion of administrative remedies, the Court stated:

> "Consonant with this doctrine plaintiffs are required to voice their objections in such a way that the Secretary or Correction Board is aware of problems *well known to plaintiffs*, and the manner a remedy is effectuated before it is effectuated. Plaintiffs could not stand on their objections waiting to see if they were retroactively promoted by the new boards and only upon the new board's adverse recommendations contend that the remedy did not achieve its intended result. The plaintiffs cannot have their cake and eat it too. Any other power of the agency to correct errors, would be wasteful of the good faith effort and expense undertaken by the Secretary in this case, and would not accord with principles of justice." (Appendix at 71-72a). (emphasis added).[16]

The Court held that Petitioners were not entitled to reinstatement and consideration by two duly convened Promotion Selection Boards but were entitled only to constructive duty time and backpay from the date they

mechanics of the Reconstituted Selection Boards even after the defect in them became known. The only issue in that case of any significance was whether or not there could be any retroactive validation of the prior illegal discharges since if there could not be, the plaintiffs in Adams would reach the 18 year sanctuary and must be retained until retirement. See AR 635-100, ¶ 3-65(d) (Appendix at 7a) and Opinion, (Appendix at 78a).

[16] The Court acknowledged that its result was "slightly different" from the result in Dilley v. Alexander, 603 F.2d 924 (D.C. 1979) which found on substantially identical facts that the restriction of consideration by the Reconstituted Selection Boards to only primary zone officers materially affected the plaintiffs' prospect for promotion and that they were entitled to reinstatement to active duty and reconsideration for promotion by duly convened statutory Promotion Boards. Likewise in that case, no waiver or estoppel defense was plead or argued by the Respondent.

were released from active service to the time when they would have been released if they had been held on active duty during the Reconstituted Board process.

Since a waiver issue had never been raised in defense by the Respondent nor briefed nor argued by either party before the Court of Claims, Petitioners filed a lengthy Motion for Rehearing and Clarification of Opinion which focused the Court's attention upon the fact that neither the ABCMR decision nor the Secretary's implementing memorandum put Petitioners on notice of the manner in which the Reconstituted Selection Boards were to be operated; that a fair and equitable reconsideration of only primary zone officers required a comparison of files of secondary zone officers; that the Reconstituted Selection Board proceedings were in fact *ex parte*; that Petitioners were not made aware of the actual content of the letters of instruction to the Reconstituted Selection Boards until the entire slate of 1974 Reconstituted Boards were almost complete; and that the Department of the Army never advised any of the Petitioners until the Reconstituted Selection Boards were complete as to what the effect of Reconstituted Selection Boards' action would be. None of the facts asserted in Petitioners' Motion for Rehearing and Clarification were disputed by the Respondent. See Defendant's response to Motion for Rehearing and Clarification. Plaintiffs' Motion for Rehearing was denied without opinion on September 30, 1979. Since the September 30, 1979 order of Court measured constructive active duty time from the date of letter notices required under AR 635-100, which were never sent, both parties filed further motions for clarification which resulted in an order being issued by the Court of Claims on November 30, 1979 which set definite dates for the termination of constructive active duty.

The Court of Claims also affirmed the ABCMR's findings that Petitioners' rights had not been violated by

reason of the Secretary's actions in establishing a 15% promotion rate in the secondary zone and by reason of the Secretary's actions in retroactively changing AR 624-100 and 635-100 in May of 1975. The Court of Claims found that the May, 1975 change merely clarified and confirmed longstanding policy and that the ABCMR's rejection of Petitioners' contentions as to the Secretary's failure to amend the regulations to provide for the 15% secondary zone selection rate was not arbitrary or lacking in substantial evidentiary support. (Appendix at 74-77a).

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE UNITED STATES COURT OF CLAIMS CONTROLS PENDING CASES INVOLVING THE DENIAL OF THE SAME STATUTORY RIGHTS BEING ASSERTED BY OTHERS SIMILARLY SITUATED.

For a period of consecutive years prior to 1976, the Secretary of the Army convened Promotion Selection Boards which considered Reserve Officers for promotion to all officer ranks, but failed to contain Reserve membership as required by statute and governing regulation. As a result of not being selected for promotion by these Selection Boards, several thousand Reserve officers were released from active commissioned service. Many of these officers have filed suit in the United States Court of Claims which actions have been suspended pending a final resolution of the issues presented in this litigation.[17]

In addition, officers who were non-selected for promotion in 1975 and 1976 have filed cases in the United States Court of Claims. These officers contend that not only was their 1975 non-selection invalid for purposes of supporting a release from active service, but that their 1976 non-selection was also defective since they were considered as

[17] "*See*, note 2, *supra*. Representative cases include Baxter, et al. v. United States (Court of Claims No. 447-77); Billingsley, et al. v. United States (Court of Claims No. 448-77); and Childers, et al. v. United States (Court of Claims No. 521-77)."

once non-selected officers contrary to law. Proceedings in these cases have also been suspended in the United States Court of Claims.[18] However, the validity of the 1975 and 1976 Selection Boards has been resolved favorably to complaining officers by the United States Circuit Court of Appeals for the District of Columbia Circuit in *Dilley, et al v. Alexander*, 603 F.2d 914 (D.C. 1979) creating a conflict in reasoning and result. See *infra* at 22.

All pending cases claim, as do Petitioners, reinstatement to active service together with active duty pay and allowances in the grade held at the time of the officer's release to the date of reinstatement. In some cases, claimants were released shortly before retirement and are claiming retirement benefits and placement on the retirement roles by reason of constructive credit for active duty. (See Appendix at 78a).[19]

In response to the adverse decision in *Doyle*, several cases have recently been filed in the United States District Court for the District of Columbia where plaintiffs are required to waive any backpay claims in excess of $10,000 which would not be a prerequisite to filing suit in the Court of Claims.[20] *See*, 28 U.S.C. § 1346(a); *compare* 28 U.S.C. § 1491.

In total, the pending litigation affected by its case involves in excess of one hundred former active duty

[18] See, McKnight v. United States, Court of Claims No. 323-79C; and Canas v. United States, Court of Claims No. 445-77.

[19] Plaintiffs in Adams v. United States, which was heard concurrently with Doyle by the United States Court of Claims are not joined in this petition since all of those officers will qualify for retirement under the provisions of AR 635-100, ¶3-65(d) in accordance with the Court of Claims decision (Appendix at 78a).

[20] These cases are: Bockoven v. Alexander, Civil Action No. 80-0417; Cooper v. Alexander, Civil Action No. 80-0416; and Bailey v. Alexander, Civil Action No. 80-0415.

officers. The implications of the *Doyle* decision go far beyond the parties to this case.

2. THE COURT'S DECISION IS IN CONFLICT WITH THE CONCURRENT DECISION IN *DILLEY, ET AL V. ALEXANDER*, 603 F.2d 914 (D.C. 1979) AND IS IN CONFLICT WITH THE PRINCIPLES OF *MATTHEWS V. ELDRIDGE*, 424 U.S. 319 (1976) AND *WEINBERGER V. SALFI*, 422 U.S. 749 (1975).

In *Dilley*, officers non-selected in 1975 and 1976 filed suit in the United States District Court for the District of Columbia prior to their release from active duty. As in *Doyle*, the Secretary took the position that the Reconstituted Boards were *solely* designed to determine whether Reserve officers had been prejudiced by the admitted violation of § 266. 603 F.2d at 924, 925. As in *Doyle*, the Secretary never argued that plaintiffs were barred from challenging the Reconstituted Selection Board proceedings by failing to exhaust administrative remedies or to otherwise object to the manner in which the Reconstituted Selection Boards were conducted. Accordingly, the Court of Appeals in *Dilley* found that since the selection of candidates from the secondary zone effectively displaced the candidates of the primary zone, the reduction in the number of available promotion vacancies before the Reconstituted Selection Boards "materially affected appellants' prospects for promotion before the [Reconstituted Selection] Boards and deprived them of substantial rights guaranteed them by the statute". 603 F.2d at 925.

In contrast to the view of the United States Court of Appeals for the District of Columbia Circuit, the Court of Claims reviewed the reduction in available promotion vacancies before the Reconstituted Selection Boards as an unimportant defect stating that in their view it was unlikely that the Reconstituted Selection Boards would have selected less than the maximum number of secondary zone officers in any event. (Appendix at 68-69a). Additionally, the Court of Claims applied the doctrine of exhaustion of administrative remedies to support its findings that Petitioners had forfeited their right to judicial review of the defect in the reconstituted boards stating:

> Decision-making bodies normally have the power to correct their own errors, *Bookman v. United States*, 197 Ct. Cl. 108, 453 F.2d 1263 (1972), and the Correction Board is no exception. The doctrine that requires that known objections be made to the agency is to insure that administrative agencies are thereby afforded an opportunity to make adjustments and correct errors on the administrative level, thus permitting the government to mitigate or avoid large damage claims that might otherwise be created (*United States v. Holpuch Co.*, 328 U.S. 234, 239 (1946)). *Blackmar v. United States*, 173 Ct. Cl. 1035, 1045, 354 F.2d 340, 347 (1965). (Appendix at 71a).

After *Doyle* was decided, Respondent filed a second Motion for Reconsideration with the Court of Appeals alleging its opinion was in conflict with *Doyle*. The Court of Appeals properly treated the *Doyle* opinion as being an exhaustion of administrative remedies decision. In dismissing the Secretary's second Motion for Reconsideration, the Court pointed out that the Secretary had agreed that plaintiffs had exhausted their administrative remedy and exhaustion was not required under this Court's decisions in *Matthews v. Eldridge, supra* and *Weinberger v. Salfi, supra*. 603 F.2d at 926.[21]

Regardless of the label applied by the Court of Claims, its opinion is, in fact, an exhaustion of administrative remedies decision. The view of the Court of Claims is clearly in conflict with the view of this Court in *Matthews v. Eldridge, supra* and *Weinberger v. Salfi, supra,* which establishes that the doctrine may not be applied when the Secretary himself has agreed that there has been exhaus-

[21] The Court of Appeals also noted that it had in the past declined to consider arguments raised for the first time on appela. 603 F.2d at 926.

tion because he has therefore satisfied himself that no further review is warranted by reason of the internal needs of the agency. See *Matthews v. Eldridge*, 422 U.S. at 330. In addition, *Salfi* recognizes the obvious proposition that once applicants have presented their claims at a sufficiently high level of review to satisfy the Secretary's administrative needs further exhaustion would be futile and a waste of administrative resources unsupported by any administrative interest. 422 U.S. at 766.

Any objection by the Petitioners to challenge the Reconstituted Selection Board process would have been futile. Any objection would not have halted the proceedings of the Reconstituted Selection Boards. Army Regulation 15-185, § 9 which governs ABCMR proceedings states that issues under consideration by the ABCMR do not operate to stay "any proceedings" being taken with respect to the person involved.[22] Any objection by Petitioners (assuming *arguendo* they had adequate knowledge to object) would have been meaningless and is, therefore, not required since there is no clear avenue of relief.

There is a conflict in analysis and result between *Doyle* and *Dilley*. The *Doyle* decision is contrary to the requirements of *Matthews* and *Eldridge*. Moreover, it is impossible for persons affected to reconcile the conflicts in these two decisions and the two conflicting results create an injustice of serious proportion. These conflicts provide sufficient grounds for this Court to review the proceedings and issue its writ of certiorari to the United States Court of Claims.

[22] See footnote 5, *supra*, for Secretary's prior application of this regulation.

3. THE DOYLE DECISION FRUSTRATES CONGRESS' PURPOSE WHICH IS TO PREVENT DISCRIMINATION IN THE PROMOTION PROCESS OF THE MILITARY SERVICES.

As a general proposition, the courts will not interfere with or review internal military management matters including the promotion process. *See*, e.g. *Orloff v. Willoughby*, 345 U.S. 83 (1953); *Brenner v. United States*, 202 Ct. Cl. 678 (1973); *Abbruzzo v. United States*, 513 F.2d 608 (Ct. Cl. 1975). However, the courts are not reluctant to review military selection board or other military proceedings where substantial rights quaranteed by statute or regulation have been violated. See e.g., *Stewart v. United States* (Court of Claims No. 198-77, December 12, 1979); *Dilley, et al v. Alexander, supra; Ricker v. United States*, 184 Ct. Cl. 402, 396 F.2d 454 (1968); *Harmon v. Brucker*, 355 U.S. 579 (1958); *Henderson v. United States*, 175 Ct. Cl. 690 (1966). It is a basic tenet of our legal system that a government agency is not at liberty to ignore its own laws and that agency action in contravention of applicable statutes and its own regulations is unlawful. E.g., *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354, U.S. 363 (1957).

In *Doyle*, the Court of Claims stated that the absence of Reserve officers could be corrected by giving Petitioners "the opportunity to be promoted in strict compliance with law". Appendix at 62a. The Court of Claims also conceded there was a difference in the manner in which Petitioners were considered for promotion between the original Boards and the Reconstituted Boards. Appendix at 66a. The difference in the manner of reconsideration could only adversely affect Petitioners. The difference in the manner of reconsideration is obviously discriminatory in violation of 10 U.S.C. § 277 and 10 U.S.C. § 3442 as well as a violation of Army Regulation 624-100 which requires that primary zone officers and secondary zone officers compete for the same promotion vacancies. *Cf.* Appendix at 50a; AR

624-100, ¶23(b). The decision sidesteps the lack of "strict compliance with law" and inherent unfairness by finding that Petitioners had waived their rights to complain.

The decision has effectively emasculated the protections intended by Congress to the Petitioners contained in 10 U.S.C. § 3442, § 266 and § 277. The policy expressed in the Court of Claims decision could drastically curtail effective judicial review of administrative action in all areas of government.

4. THE COURT OF CLAIMS DECISION, THROUGH A MISCHARACTERIZATION OF THE ISSUE AND INCOMPLETE AND MISLEADING RECITATION OF FACTS, DOES NOT DISCLOSE TO FUTURE LITIGANTS THAT IT CREATES A NEW STANDARD WHICH MUST BE MET BY THOSE SEEKING REVIEW OF ADMINISTRATIVE ACTION, WHICH STANDARD IS CONTRARY TO EXISTING LAW.

The opinion mischaracterizes the Petitioners' claim as being a complaint that the Selection Boards did not completely redo the job of the defective boards in that they "did not reconsider officers from the secondary zone". Appendix at 67a. The Court finds the determinative factor in the case to be that Petitioners "were aware from the Correction Board's decision that *only officers in the primary zone would be reconsidered*". Appendix at 69a. Petitioners' actual complaint was that the reconsideration of primary zone officers was conducted in an improper *manner* because it did not involve a *comparison* of primary zone officer records with secondary zone officer records to determine whether any of the primary zone officers being reconsidered would be entitled to some of the promotion vacancies previously granted primarily to Regular officers in the secondary zone. See Plaintiffs' Motion for Rehearing at 1-5. It is only by virtue of this mischaracterization that the Court can find that the ABCMR's decision put Petitioners on notice of the restricted scope of their promotion reconsideration.

The opinion is also inadequate due to an incomplete and misleading recitation of material facts. The opinion sets forth the following facts which are either misleading or not disclosed:

(a) that the "Reconstituted Boards utilized the same instructions and guidelines the Secretary had given the original boards". (Appendix at 67a) In fact, the instructions and guidelines were rewritten to delete secondary zone promotions;

(b) there is no disclosure that Petitioners were *not* advised of the contents of the rewritten letters of instruction until after the Reconstituted Selection Boards were well underway and only after Petitioners request. See, *supra* at 11;

(c) that Petitioners knew exactly how the results of the evidentiary proceedings" would be used by the ABCMR and that Petitioners were satisfied with the opportunity to be promoted retroactive to the action of the original Selection Boards. Appendix at 70a. In fact, Petitioners had no knowledge of how the results would be used when reported to the ABCMR. See, *supra* at 9-10.[23]

(d) that if Petitioners had complained the proceedings would have been halted (Appendix at 71-72a). The opinion does not disclose that the Secretary's own regulation (AR 15-185, ¶ 9) and prior actions would indicate the proceedings would not have been halted. See, *supra* at note 5.

[23] Certain options were open to the ABCMR, among which would be merely to see if two boards looking at the same records under identical instructions with only the membership of the boards changed would report significantly different results. If that happened, the ABCMR might determine that the error was in fact "harmful" and order all claimants back to active service to be considered by two new statutory Promotion Selection Boards convened in due course. The Court of Claims' characterization of the facts necessarily does not lead to a consideration of this alternative which would have been consistent with the power granted to the Reconstituted Selection Boards by the Secretary as merely "evidentiary proceedings".

(e) that the Secretary did not argue any form of estoppel, waiver or exhaustion of administrative remedies and that the Secretary did, in fact, view the issues presented by Petitioners as properly before the court and ripe for resolution.

(f) the opinion infers that the initial filing of the *Adams* proceedings in the United States District Court for the District of Columbia on April 13, 1976 was somehow an attempt to hide the defect in the evidentiary proceedings from the Secretary, when the results of the Reconstituted Selection Boards had no effect on the outcome of *Adams*. See *supra* at note 15.

(g) that the "problems" with the evidentiary proceedings were unknown to the Secretary and that the Secretary undertook a "good faith effort" so that allowing Petitioners to prevail "would not accord with principles of justice". (Appendix at 71-72a).

Ignored is the fact that the Secretary knows the law as well as Petitioners, particularly since the issue of interference with Promotion Board discretion to determine the number of secondary zone promotions was before the ABCMR in this case. (Appendix at 35a). It was clear from the Secretary's submissions in this case that he took a calculated risk in devising the "test for prejudice" as a means to uphold Petitioners' release from active service based upon non-selection given by the original boards. See, Defendant's Reply to Plaintiffs' Response to Defendant's Cross-Motion for Summary Judgment, pp. 5-6, 16. *Compare Dilley v. Alexander, supra* at 924 (commenting that this was a "ends-justifying-the-means procedure").

The Court of Claims decision is setting forth a new standard for litigants seeking review of administrative remedies because none of the elements required of a waiver are present in this case. Waiver requires acts

indicating an intentional relinquishment or abandonment of a known right or privilege. *Curtis Publishing Company v. Butts,* 388 U.S. 130, (1967). Knowledge of the facts upon which the waiver is based must be clear and without question, particularly in cases of this nature. Waiver is not applied where knowledge of the ultimate fact must be assumed by implication. *Shearson Hayden Stone, Inc. v. Leach,* 583 F.2d 367 (7th Cir. 1978); *United States v. Newman,* 478 F.2d 829 (8th Cir. 1973). The Court of Claims cited no cases on the doctrine of waiver in support of its decision, but in fact relied only on cases dealing with the exhaustion of administrative remedies.

By reason of all of the above, the Court of Claims opinion is not in accordance with existing law. Litigants and potential litigants before all federal agencies who are not intimately familiar with the facts of this case are seriously misled as to the standards which the Court of Claims may require of those seeking judicial review. Future litigants are not put on notice that they will be required to be watchdogs over any administrative remedial process that occurs after the close of their adversary hearing even where they do not what the effect of the remedial process will be on their claim.

For all of these reasons it is appropriate for this Court to issue its writ of certiorari to the United States Court of Claims.

5. THE DECISION WILL LEAD TO LENGTHY ADMINISTRATIVE PROCEEDINGS AND MAY CAUSE MANY ADMINISTRATIVE PROCEEDINGS TO BE DEEMED INADEQUATE UNDER THE DOCTRINE OF EXHAUSTION OF ADMINISTRATIVE REMEDIES.

The *Doyle* decision requires applicants to file with the agency concerned, Motions for Reconsideration or objections to any granted remedy if there is any conceivable reason to suspect that the remedy does not or may not conform to law. *Contra,* 5 U.S.C., § 704. See, Plaintiffs'

Motion for Rehearing at 14-15. Therefore, the impact of the *Doyle* doctrine must necessarily lead to more protracted administrative proceedings. Numerous authorities indicate exhaustion is not required where further appeals to the agency would unduly delay plaintiffs' remedy or would be futile. *Isbrandtson v. United States,* 211 F.2d 51 (D.C. Cir. 1954); *Sunshine Publishing Company v. Summerfield,* 184 F. Supp. 767 (D.C. 1960).

In the case of military officers, delay in granting them a remedy causes irreparable injury. The most important single document in an officer's record is the officer efficiency report. During a period when an officer is off active duty he is not performing in an assignment and receiving no efficiency reports. Therefore, a reinstatement to active duty with constructive active service and correction of his records still leaves him with irreparable injury because the gap in his service records may effectively preclude any hope for further promotion. Constant objections or requests for reconsideration of curative proceedings will necessarily lead to further delay which may render the administrative proceedings inadequate to provide any realistic remedies for the officers concerned. All of this is unnecessary and contrary to the policy of requiring exhaustion of administrative remedies since the latter consideration is intended only to give the administrative agency concerned an opportunity to pass on questions within its own expertise and to cure error. Where the agency is given that opportunity and institutes remedies which are inadequate or defective, no rational policy should require Petitioners to resubmit themselves to the administrative process only to be prejudiced by further delay.

6. THE DECISION ENCOURAGES ADMINISTRATIVE AGENCIES TO ISSUE VAGUE AND IMPRECISE DECISIONS AND ALLOWS THEM TO BENEFIT FROM A KNOWING VIOLATION OF LAW.

Since the ABCMR's decision and Secretary's implementing memorandum cannot realistically be said to put Petitioners on notice of the diminution of promotion vacancies for which Petitioners were entitled to compete as a matter of law and since the Secretary vigorously insisted that the proceedings were evidentiary only, executive agencies are now in a position to benefit from vague and imprecise decisions which mislead future claimants leading those claimants to be barred from seeking judicial review under the *Doyle* doctrine.[24] Indeed, the opinion accomplishes exactly what the Court of Claims said it was not doing, which is to provide a method whereby administrative agencies can avoid meeting their statutory obligations and avoid obeying their own regulations contrary to the clear directives of this Court. See, e.g., *Viteralli v. Seaton, supra; Harmon v. Brucker,* 355 U.S. 579; and *Service v. Dulles, supra.*

[24] This Court cannot assume that administrative agencies will always deal fairly with the public. In Dilley v. Alexander, supra, the Government prevented a preliminary injunction holding those plaintiffs on active duty until their case was decided on the grounds that the Court could grant to them retroactive backpay, credit for time served and other emoluments of service if they were successful. Therefore, the Government argued under Sampson v. Murray, 415 U.S. 937 (1974), a preliminary injunction was not warranted. The Court accepted the Government's argument. After the Court of Appeals decision invalidating plaintiffs' discharges and ordering them reinstated to active duty, the Government now contends that those plaintiffs are entitled to no retroactive credit for the time served, backpay and allowances and other emoluments of service and are entitled merely to be placed back in the military — obviously to be non-selected twice again due to the gaps in their military record and then processed out of the service.

7. THE DECISION ALLOWS ADMINISTRATIVE AGENCIES TO VIOLATE THEIR OWN REGULATIONS BY RELYING UPON A PAST PATTERN OF VIOLATIONS.

The *Doyle* decision sanctions changes in Governmental regulations by implication and retroactive changes in regulations to validate an act in violation of published Governmental regulations. Prior to the *Doyle* decision it had been a fundamental principle of administrative law that Government agencies, including the service secretaries, must strictly observe regulations which they had established. *Vitarelli v. Seaton, supra, Service v. Dulles, supra; U.S. v. Shaughnessy,* 347 U.S. 260 (1954). Army Regulation 624-100 controls the promotion of commissioned officers on active duty and Army Regulation 635-100 governs the release from active duty of commissioned officers. These Regulations are comprehensive in scope and applicable to both Regulars and Reserves.[25] When the original Promotion Selection Boards were conducted, the Secretary instructed the Board that it could select a maximum of 15% from the secondary zone for the grade of Lieutenant Colonel and Major contrary to the then published provisions of AR 624-100, ¶ 23.[26]

The Correction Board and the Court of Claims viewed the Secretary's action as valid relying upon the fact that on September 19, 1972 an all units message announced that the Secretary had approved "policy" for modification of the secondary zone to 15%. ABCMR Record, Vol. VII,

[25] The procedures to amend the regulations are set forth in army regulations 310-1, 310-2, and 310-3. These procedures provide that a regulation can be amended or added to only by the publication of changes published as numbered changes to the basic regulation and further provides that serious errors are to be corrected immediately by published changes but that minor changes not affecting policy or doctrine can accumulate and be published in the next major change or revision to the regulation. See ABCMR Record, Vol. VI, R-1112.

[26] See note 3, *supra*.

R-1170.[27] Change no. 3 to AR 624-100 was published on August 6, 1974 which did not incorporate the terms of the September 19 policy modification. The facts are set forth in the opinion at 76-77a with the exception of the publication of change no. 3 in August of 1974.

AR 635-100, the discharge authority, at the time of the original Selection Boards in question provided that a Reserve officer could not be released from active duty unless he had been twice found by Selection Boards to be "not fully qualified" to assume the duties of the next higher grade under AR 624-100. (Appendix at 6a). The Correction Board found that Petitioners were in fact "fully qualified". (Appendix at 37, 75a). In 1968 the Secretary issued a message "pending revision of AR 624-100 to the effect that Reserve officers who were twice reported as non-selected would be relieved from active duty under 635-100.[28] The definition of "non-selected" was not fundamentally different than the "not fully qualified" definition contained in AR 624-100. The Correction Board and Court of Claims also relied upon a 1970 message which again changed the categorization of officers before Selection Boards but mentioned nothing about these categories affecting release from active duty. ABCMR Record, Vol. VII, R-1187. Appendix at 74a.

[27] The message did not indicate its duration; was not announced as a change to the Regulation but is only a change in policy. The message did not comply with AR 310-1, AR 310-2 or AR 310-3 as a change to the Regulation.

[28] The message actually established 3 categories of officers before Selection Boards. Selected for promotion; selected for retention in grade (meaning performance and indicated potential warrant possible future advancement) and those non-selected (meaning those officers whose current performance does not justify immediate advancement and whose indicated potential did not clearly sustain the possibility of future advancement). ABCMR Record, Vol. VI, R-978.

Subsequent to these messages,[29] two changes to AR 635-100 were published which stated that Reserves could not be discharged from active duty as a result of Selection Board action unless they failed a second time to be considered "fully qualified" under AR 624-100, the last of which was published on January 14, 1975.[30] Appendix at 6a.

On May 19, 1975 at 6:00 p.m., the day before the convening of the 1975 Major Selection Board, and subsequent to the filing of an application with the ABCMR by an officer non-selected in 1974 complaining that there was no factual finding that he was "not fully qualified" the Secretary issued an unnumbered change to AR 624-100. This change, stated that if a Reserve was twice reported by a Selection Board as not recommended for promotion, he would be released from active duty. An editorial comment at the end of the message indicated that the change was "intended to clarify past and present Department of the Army policy" and that the wording of the change conformed to the "intent behind and practice under" the previous version. The editorial comment went on to state that "accordingly failure to be recommended for promotion both *before and after* the date of the message counts toward removal from active duty". ABCMR Record, Vol. VII at 1164-1168.

The Court of Claims approved the Correction Board's findings that the message was not a retroactive change but merely "clarified and confirmed a longstanding departmental approved policy that an officer who was not selected (recommended) for temporary promotion to the next higher grade would have such non-selection counted toward separation".[31] The ruling authorizes any depart-

[29] Neither message met the requirements of AR 310-1, 310-2, and 310-3 for changes to regulations.

[30] Change 17 published November 7, 1973, 1252 and change 20, published January 14, 1975; Appendix at 5-6a.

[31] Appendix at 76a.

ment secretary to ignore his own published regulations and justify his actions by pointing to any longstanding policy of ignoring the regulations.

Petitioners submit that the Court's holding is contrary to this Court's authority cited above and establishes a dangerous precedent which can render published departmental regulations meaningless.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Claims.

Respectfully submitted,

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February 25, 1980

APPENDIX

DEPARTMENT OF DEFENSE INSTRUCTION

Subject: Inclusion of Reservists on Boards Considering Members of Reserve Components under Section 266 of Title 10, U.S. Code

Reference: (a) DoD directive 1205.4, relative to same subject, November 26, 1952 (hereby cancelled)

Purpose

To provide basic guidance to the military departments in carrying out the provision of Section 266 of Title 10, U. S. Code, requiring inclusion of appropriate numbers of members from the reserve components on all boards convened for the appointment, promotion, demotion, involuntary release from active duty, discharge, or retirement of members of the reserve components.

Cancellation

Reference (a) is hereby superseded and cancelled.

Policy

A. All boards convened for the appointment, promotion, demotion, involuntary release from active duty, discharge, or retirement of members of the reserve components shall be constituted as prescribed by the appropriate Secretary, and shall include appropriate numbers of members from the reserve components.

B. The intent of the Congress in this Section is clear, that a member of a reserve component who is the subject of any of the indicated board actions shall be assured a fair representation of reserve membership on the board. The Secretaries of the military departments will, with due regard to availability of qualified reservists, pertinent statutory provisions, the nature of the board action, and the categories, regular and reserve, which may be consi-

dered by the board, provide in the membership of the indicated boards, to the fullest practicable extent, a fair and adequate representation of members from the reserve components.

Implementing Directives

It is requested that the Assistant Secretary of Defense (Manpower, Personnel and Reserve) be made an information addressee on implementing departmental directives relating to this policy.

Signature not legible

Assistant Secretary of Defense
(Manpower, Personnel and
Reserve)

AR 624-100

Section I. GENERAL

1. **Purpose and scope.** This regulation prescribes the policies and procedures for temporary promotion in the Army of the United States of commissioned officers and warrant officers on active duty under the provisions of title 10, United States Code, sections 3442, 3447, and 3449 and for the promotion of Regular Army officers in their permanent grades. It does not apply to officers on active duty for training or with the Selective Service System, to promotion of Reserve officers in their permanent grades, or to officers of separate corps holding statutory positions in those corps.

2. **Definitions.** *a. Active duty.* The term "active duty" when used in this regulation with reference to qualifying service for promotion refers to full-time duty of 1 day or more in the active military service of the United States (10 U.S.C. 101 (22)), and full-time duty of 1 day or more performed under title 32, United States Code, sections 502-505. It does not include drill periods or retirment points.

b. Commanders. For the purpose of this regulation includes those commanders and heads of Army staff agencies responsible for maintaining officers' personnel records.

c. Basic date. An established date assigned to each Regular Army commissioned officer which reflect all service creditable for permanent promotion purposes.

d. Best qualified. Selected from among the fully qualified (*e* below) and determined by a promotion selection board to be the best qualified to meet the needs of the Army.

e. Fully qualified. Considered by a promotion selection board as qualified professionally and morally, of demonstrated integrity, and capable of performing the duties expected of an officer of his branch in the next higher grade.

f. Not fully qualified. Considered by a promotion selection board as not qualified to perform the duties or assume the responsibilities normally expected of the next higher grade. No such designation is applied to nonselection to colonel, any promotion list, or to lieutenant colonel, WAC, ANC, or AMSC.

g. Officer. The term officer(s) includes both commissioned and warrant officers.

h. Passover. The result of being considered "not fully qualified" for promotion by a promotion selection board.

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Section IV. TEMPORARY PROMOTION OF OUTSTANDING OFFICERS

22. **General.** Temporary promotion of outstanding commissioned officers from a secondary zone below the primary zone of consideration is authorized within limitations outlined below. This policy is designed to give those commissioned officers who have demonstrated exceptional ability the opportunity to be considered in advance of their normal eligibility.

23. **Zones.** *a.* Officers may be considered for promotion under this section to colonel, lieutenant colonel, or major providing they have completed the following service:

To grade of	*Minimum years by DOR in next lower grade (as of 31 December of year of consideration)*
Colonel	3½
Lieutenant colonel or major	3

b. Selection boards will be instructed that the maximum number of officers who may be selected from the secondary zone will not exceed—

To grade of	*Percentage of total number who may be selected*
Colonel	10
Lieutenant colonel	7½
Major	5

Example: A selection board selects 2,000 captains for promotion to the temporary grade of major. Of these, not more than 100 may be selected from the secondary zone.

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25. **Nonselection.** Only a very small number of officers may be selected for promotion under these provisions. Consequently, nonselection will not count as a passover nor reflect against officers in any way.

* * * * * *

7 November 1973 **C 17, AR 635-100**

Section XVII. FAILURE OF SELECTION FOR TEMPORARY PROMOTION

3-65. General. *a.* Except as indicated below, the following officers will be relieved from active duty on the 90th day after receipt of involuntary release notification unless voluntary earlier release is requested.

(1) Reserve commissioned officers serving on active duty as commissioned officers and AUS commissioned officers, who fail a second time to be considered fully qualified, under AR 624-100, for promotion to temporary AUS grade of: captain, major, or lieutenant colonel, provided 9 months or more elapse between adjournment dates of selection boards.

(2) Reserve warrant officers serving on active duty as warrant officers who fail a second time to be considered fully qualified under AR 624-100, for promotion to temporary AUS grade of Chief Warrant Officer W-3 or W-4, provided 9 months or more elapse between adjournment dates of selection boards.

(3) AUS warrant officers who fail a second time to be considered fully qualified, under AR 624-100, for promotion to temporary AUS grade of Chief Warrant Officer,

W-3 or W-4, provided 9 months or more elapse between adjournment dates of selection boards.

b. Officers having 90 days or less remaining to serve on active duty as reflected by a current service agreement due to denial or declination of further active duty, and officers who have been notified of their impending involuntary release from active duty under any other provisions of law or regulations, are not subject to this section.

c. An officer eligible for retirement under chapter 4 may apply for retirement, to be effective not later than the first day of the month following the month in which release is directed.

d. Officers who will complete 18 or more years of active Federal service on their scheduled release date will *not* be processed under this section unless such action is approved by the Secretary of the Army, but will be retained on active duty until the last day of the month following the month in which they complete 20 years of active Federal service.

* * * * * *

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(3) AUS warrant officers who fail a second time to be considered fully qualified, under AR 624-100, for promotion to temporary AUS grade of Chief Warrant Officer, W-3 or W-4, provided 9 months or more elapse between adjournment dates of selection boards.

★ (4) Reserve commissioned and warrant officers serving on active duty in the grade of second lieutenant or warrant officer, W-1, who fail to be selected for temporary promotion to first lieutenant or chief warrant officer, W-2, in the AUS will be released from active duty.

b. Officers having 90 days or less remaining to serve on active duty as reflected by a current service agreement due to denial or declination of further active duty, and officers who have been notified of their impending involuntary release from active duty under any other provisions of law or regulations, are not subject to this section.

c. An officer eligible for retirement under chapter 1 may apply for retirement, to be effective not later than the first day of the month following the month in which release is directed.

d. Officers who will complete 18 or more years of active Federal service on their scheduled release date will *not* be processed under this section, unless such action is approved by the Secretary of the Army, but will be retained on active duty until the last day of the month following the month in which they complete 20 years of active Federal service.

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DEPARTMENT OF THE ARMY

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

Proceedings

IN THE CASE OF: 10 December 1975
LOUIS D. GADDINI, 342-22-2633, et al.*
THEODORE J. KMIECIAK, JR., 202-30-5433, et al
JACOB A. HOPKINS, 188-32-6456, et al

I certify that hereinafter is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in the case of the above-named individuals. A quorum was present during the hearing and deliberation. The following findings, conclusions and recommendations were adopted by the Board.

Applicants request correction of military records as stated in applications to the Board and restated herein.

The Board convened at the call of the Chairman on the above date and, following consideration of the case and having made its determination thereof, proceeded to other business.

Present:

Mr. Gordon M. Hobbs, Chairman; Mr. Oliver Kennedy, Member, Mr. Charles R. Woodside, Member, Mr. James C. Hise, Member, Mr. James L. Stroud, Member, Mr. Raymond J. Williams, Executive Secretary, Mr. E. E. Wilmeth, Examiner.

One applicant, Theodore J. Kmieciak, Jr., appeared before the Board. Applicants Louis D. Gaddini and Jacob A. Hopkins were unable to appear before the Board. All applicants were represented by counsel.

The Board considered the following evidence:

Exhibit A — Applications for Correction of military records with counsel's brief.

* These applications were designated as lead applications with the opinion applying to other applications raising the same issues.

Exhibit B — Military Personnel Records.

Exhibit C — Case Summaries with RED TABS A through G.

Exhibit D — Transcript of Hearing.

Exhibit E — Exhibits A through J submitted by counsel at Hearing.

Exhibit F — Additional Exhibits K through M submitted by Office of the Judge Advocate General.

Exhibit G — Counsel's additional Exhibit N.

Exhibit H — Depositions of 12 Selection Board members.

The Board Finds:

1. That the applicants have exhausted all administrative remedies afforded by existing law or regulations.

2. That it incorporates in these proceedings and adopts by reference thereto so much of the Exhibits above, as pertains to the factual showing of the Department of the Army records which generally reflect:

a. that the applicants request in substance correction of their military records to show them;

(1) either promoted to the next higher temporary grade or entitled to reconsideration for promotion to the next higher temporary grade;

(2) restored to active duty, as applicable, without loss of active duty commissioned service and basic pay and allowances;

(3) such other relief as may be deemed necessary and appropriate; and that at the hearing counsel for the applicants modified their requests to the effect that the applicants either be reconsidered for promotion through additional specially convened boards or call them back to active duty, negate their termination orders on the grounds that the passovers were invalidly issued, and place them in the normal cycle for promotion consideration by the next regularly scheduled selection boards;

b. that the military records of the applicants reflect in general and in pertinent part that they were born during the period 1921 and 1943; that they were either appointed as commissioned officers or warrant officers of the United States Army Reserve (USAR) for an indefinite term; that they either were voluntarily ordered to and entered on their current tours of active duty for an indefinite period of time, or that they were initially ordered to and entered on active duty voluntarily under a two or three year obligated tours of duty after which their tours of active duty were voluntarily extended for an indefinite period; and that they understood that they may be released from active duty for any one of the following reasons:

(1) Voluntary requested in accordance with applicable regulations;

(2) Forced reduction in Army strength;

(3) Promotion passover as prescribed in applicable regulations;

(4) Failure to meet acceptable standards of efficiency or conduct;

(5) Completion of the maximum Reserve commissioned service or attainment of the maximum age, whichever occurs first, as prescribed in applicable regulations;

(6) Completion of a specified period of active Federal service (20 years) or attainment of the maximum age in the cases of warrant officers.

c. that through temporary promotions in the Army of the United States (AUS) they attained the temporary grades of Major, Captain, or Chief Warrant Officer (W-2) and (W-3);

d. that in the class group of Kmieciak-et al, the applicants military records along with those of other eligible captains were referred to Army Selection Boards which convened on 30 January 1974 and 19 February 1974 for consideration for promotion to the grade of Major, AUS, under approved Letters of Instructions; that at some point in February 1974 the then Secretary of the Army (Howard

H. Callaway) directed that a new board be convened since in his judgement the January 1974 Selection Board did not comply with the intent of his original guidance, even though the board complied with the literal language of the guidance; that consequently under new Letters of Instructions the applicants were referred for consideration for promotion to the temporary grade of major, AUS, by Department of the Army (DA) Promotion Selection Boards which convened on 2 April 1974 and 15 April 1974 under the "best qualified" method of selection within the primary zone of selection; and that they were not recommended for promotion by these selection boards;

e. that in the class group cases of Gaddini-et al and Hopkins-et al, the applicants were considered and not recommended for promotion to the temporary grades of Lieutenant Colonel and Chief Warrant Officer (W-3) or (W-4), as appropriate, under the "best qualified" method of selection by DA Promotion Selection Boards which convened in January and March 1974; and that the selection boards concerned operated under approved Letters of Instructions and guidance furnished;

f. that all of the applicants were again considered for temporary promotion to the next higher grade under the "best qualified" method of selection within the primary zone of selection by appropriate DA Promotion Selection Boards which convened in January, March, April, and May 1975 under approved Letters of Instructions and guidance furnished; and that they were not recommended for promotion by these selection boards;

g. that in 1974 all of the applicants were notified in pertinent part that as a result of the 1974 DA Promotion Selection Boards they were among those officers considered but not selected, and that their nonselections constituted a passover for promotion as defined in Army Regulation (AR) 624-100; that in 1975 they were notified in pertinent part that as a result of the DA Promotion Selection Boards of 1975 they were not best qualified for promotion to the next higher grade; that since this

determination constituted their second nonselection for promotion, DA policy as specified in Section XVII, Chapter 3, AR 635-100 required their release from active duty on the 90th day after receipt of the notification; and that all applicants except three were scheduled for release from active duty during the months of October through December 1975 and January 1976 after having completed between over 6 years and 10 months and 17 years and 11 months active Federal service. The three excepted applicants had completed over 18 years active Federal service and since they were within two years of becoming eligible for retirement under law, they were not scheduled for release from active duty;

h. that on 24 September 1975 and 28 October 1975 counsel for the applicants submitted applications in behalf of the applicants along with his Brief and raised the following points of issue:

(1) that the Secretary of the Army's action in voiding the selection boards action in the first 1974 Captain to Major, AUS, selections was unlawful;

(2) that the percentage of selections directed from the secondary zone by the Secretary of the Army was unlawful;

(3) that the Secretary's action in directing the reservation of a designated number of promotions from the secondary zone was unlawful;

(4) that the Secretary's instructions to the selection boards constituted a directive to the boards to consider youth as a primary asset in the primary zone as well as the secondary zone;

(5) that the 19 May 1975 messages amending AR 624-100 and AR 635-100 are not applicable to the applicants; and

(6) that the apparent lack of any Reserve membership on any of the selection boards involved was contrary to 10 U.S.C. 266 and DOD Instruction #1205.4, dated 23 June 1959.

i. that on 6 November 1975 The Deputy Chief of Staff for Personnel (DCSPER) submitted a detailed report with nine inclosures to this Board, as requested, relative to the first five points of issue and stated pertinently:

(1) that the requests of the applicants are without justification;

(2) that the actions taken by the Department of the Army, in all respects, were according to regulations and established procedure;

(3) that withdrawal of their notifications of release from active duty would be without basis. The fact that the applicants are Reserve officers twice "not recommended for promotion" by duly constituted promotion boards required their release by regulation, accepted procedure, announced policies, common knowledge, and based on the long established principle of aligning the temporary promotion system and involuntary separation/retirement policies with the statutory provisions of the permanent (RA) promotion system;

(4) that removal from their records that they were "twice not recommended" for promotion would belie the fact that they were so categorized by two duly constituted promotion boards and would be unfair to other officers similarly categorized for many decades;

(5) that applicants have not been selected for promotion by a promotion board; therefore their promotions are not justified or warranted and would be grossly unfair to others similarly situated over many years. Since the board did not determined that they were amongst the "best qualified", their promotions to the higher grade would not be in the best interest of the United States Army or the United States Government;

(6) that prior board proceedings were not defective; therefore, reconsideration by the next Selection Board, with that Board being instructed as applicants request is not justified;

(7) that based on approved regulations and adherence to long standing established policies and procedures,

the DA Office of the Deputy Chief of Staff for Personnel is of the opinion and takes the firm position that the applicants have been afforded all rights to which entitled and all actions taken concerning their consideration for promotion and involuntary separation were in accordance with decisions made by the Secretary of the Army or delegated to his subordinates; hence, in accordance with regulations; and

(8) that further details and amplification regarding the Army Staff position and its rationale in the matter were contained in Inclosures Number 1 through 9 of their report.

j. that on 6 November 1975 The Assistant Judge Advocate General for Civil Law concurrently submitted the Army Brief in Opposition to the Applications as Inclosure Number 10 to the detailed report referred to above relative to the common issues of law and fact raised by the applicants and counsel on the first five points of issue. It was concluded:

(1) that the Secretary of the Army is not bound to accept the recommendations of a promotion selection board;

(2) that the Secretary of the Army personally determined that acceptance of the recommendations of the January 1974 promotion selection board (Captain to Major) would not be in the best interest of the Army;

(3) that Section IV, AR 624-100 pertaining to secondary zone selection rates was effectively changed in 1972 by electrical message and has been followed;

(4) that the Secretary of the Army did not direct the reservation of a designated number of promotions to secondary zone officers;

(5) that the temporary (AUS) promotion system implemented by the Secretary gave due regard to seniority and age;

(6) that promotion selection boards were not directed to reserve a designated percentage of promotion recommendations to secondary zone officers;

(7) that instructions and guidance given the selection boards in question were fair and equitable;

(8) that promotion selection boards were not directed to consider youth as a primary asset for selection in the primary zone;

(9) that the 19 May 1975 amendments to AR 624-100 and AR 635-100 do not deprive the applicants of property without due process of law;

(10) that the applicants have neither a property nor a liberty interest affected by the 19 May 1975 amendments;

(11) that the May 1975 amendments do not operate retroactively and were intended to clarify past and present Army policy and practice; and

(12) that there has been no legal error and the applicants have suffered no injustice.

k. that on 18 November 1975 counsel for the applicants submitted his response to the Army's staff and legal positions relative to first five points of issue raised by him and the applicants. In essence it was contended pertinently that the Secretary is bound to accept the selection board's recommendation under the circumstances in the matter; that AR 624-100 was not changed by any of the referenced policy messages; that the May 1975 Department of the Army message amendments do not clarify basic policy and practice; that the Secretary did in fact direct the reservation of a designated number of promotions to secondary zone officers; that with respect to the retroactivity of the May 1975 Department of the Army message amendments, the applicants point out that for a substantial period of time officers had been led to believe that they would be retained in service as long as their performance was such as to indicate that they were qualified to assume the duties of the next higher grade; that the radical change attempted by the Secretary cannot be explained away by arguments contending that the May 1975 Department of the Army messages simply drew on antecedent facts and therefore was not retroactive; and that there is nothing

within the context of cited statutes to suggest that the Secretary was authorized to issue anything except prospective regulations insofar as those regulations relate to promotion actions.

l. that on 26 November 1975 The Deputy Chief of Staff for Personnel (DCSPER) submitted its response to Counsel's rebuttal to the Army staff and legal positions. In essence, DCSPER sustained the Army staff's position as presented on 6 November 1975, notwithstanding counsel's rebuttal thereto;

m. that on 2 December 1975 the DCSPER responded to the issue raised by the applicants and counsel relative to the apparent lack of any Reserve member on any of the Selection Boards involved. In essence, DCSPER agreed and emphasized that 10 U.S.C. 266 prescribed an *appropriate number* of Reserves, as prescribed by the Secretary concerned; that DOD Instruction 1205.4 established the policy that . . . boards . . . shall be constituted as *prescribed* by the appropriate Secretary and shall include appropriate *number* of members from the Reserve components; and that AR 624-100 prescribed . . . boards will, *where practicable,* include at least one officer of the Reserve components. However, it was stated pertinently that DA personnel staff officers considered the foregoing adequately permissive to allow for appropriate and practical flexibility in the process of selecting potential nominees and nominating them as board members;

n. that at the hearing counsel for the applicants called three witnesses who testified before the Board and presented certain statistical data, charts, and other information pertaining to the Reserve membership requirements of 10 U.S.C. 266, the availability of Reservists to sit as members of AUS Promotion Boards, and the correlation between age and selection/nonselection, among RA officers and Reserve officers; that he restated the points of issue as setforth in his original brief and covered in subparagraph 2h above, giving particular emphasis to the last issue to which Major General James Milnor Roberts, Jr., testified

relating to the requirements of 10 U.S.C. 266 wherein "each board convened for the appointment, promotion, demotion, involuntary release from active duty, etc., of Reserves shall include an appropriate number of Reserves as prescribed by the Secretary concerned under standards and procedures established by the Secretary of Defense". Counsel felt that the intention behind that statute clearly was that the number that shall be included on the boards was a matter of Secretarial discretion; that the statute did not state that a board had to have a majority of Reserves; that the law did not say that 10 percent of the membership had to be Reserves; that it just stated that an appropriate number shall be include on each board with discretionary power being left to the Secretaries of the services to decide what an appropriate number is; and that the position of the applicants and himself was that "zero" could not be an appropriate number because the statute would have no meaning whatsoever. With respect to the first issue regarding the Secretary's action in voiding the first 1974 captain to major Selection Board's action, Counsel stated pertinently that once the Secretary makes regulations, he must follow them scrupulously as the Courts have said; that AR 624-100 specifies the circumstances under which officers can be taken off of a board recommended list and that the board action is administratively final; and that he submitted that when AR 624-100 was written and promulgated, the Secretary had stripped himself of discretion in the matter and no longer had discretionary authority after promulgation of AR 624-100 to not accept a promotion board's entire recommended list. In this connection, counsel submitted an exhibit relative to the correspondence between Secretary Callaway and Senator Thurmond to the effect that it was recalled that Captain Norris N. Lowe was one of four officers who have been selected by the first 1974 captain to majors' AUS Selection Board. Subsequently, Captain Lowe was not selected by the new 1974 captain to majors' AUS Selection Board which the Secretary convened.

At this point of the hearing former Secretary of the Army (Howard H. Callaway) appeared before the Board as a witness and referred to his affidavit of 24 October 1975. He stated to the effect that in the wind-down of the Vietnam war, Secretary Froehlke who preceded him made the announcement that 15 percent of the list for promotion from captain to major was to go below the primary zone; that it was to give those officers who were particularly outstanding some kind of opportunity to advance more rapidly; that he publicly endorsed that statement inasmuch as it was well understood and well accepted; that when the captain to majors' promotion board was in the planning, the DCSPER went over the whole situation with him and brought up the question of the 15 percent because there had not been a promotion board to major for five years; that there were a great many well-qualified captains, who in the opinion of the DCSPER were entitled to promotion to major and that if 15 percent were allowed to be taken away from the captains who were entitled to promotion to majors, such action would take away promotions from good captains; that however he saw just as clearly that there were a lot of officers in the secondary zone, outstanding officers who had under a promise of the then Secretary of the Army to which he was also committed and with whom he did not want to break faith; that after working with the problem for a good bit of time in coordination with his staff, he decided to go to a 13-month promotion list before the next promotion board; that by doing this the Department was able to hold to the 60 percent which was all that was ever recommended, while at the same time they were also able to hold to the 15 percent for below the primary zone; that therefore he issued instructions to the promotion board and was assured his instructions were clear as to his intent; that subsequently it was brought to his attention that the promotion board was about ready to come up with recommendations, but was not quite there in so far as coming up with 15 percent; that to the best of his

recollection the promotion board had come up with approximately 8 percent; that shortly thereafter he talked at length with the President of the board about the procedure utilized and was not pleased because it was very mechanical; that as result he caused to be brought in to him roughly eight officer files at the bottom of the primary zone and 8 files of officers nonselected in the secondary zone; that after personally looking at all the files, the officers' files below the primary zone were clearly superior to the other files; that to confirm his opinion, he mixed the files up without regard to primary zone and secondary zone and had them evaluated independently by three officers who had much experience and were superior officers in the Army; that they came back with their individual evaluations and in every case every below-the-zone officer was selected over the primary zone officers; that the gap in quality between the two groups was enormous; that prior to acting he checked with General Abrams who conducted his own independent investigation; that three days later General Abrams returned incensed and stated that the Secretary's intent which was well known had not been acted upon and was violated; that while he did not believe that the board members had any conspiracy to violate his intent, General Abrams suggested that a new board be convened; that accordingly a new board was called back and instructions were changed to make it crystal clear what his intent was; that no recommended list was formally submitted by the first captain to majors selection board of 1974; that no other files were personally reviewed by him other than the 16 files mentioned earlier; that he was never advised until recently of any requirement to have at least one Reserve officer sitting on a promotion board panel; and that had he been aware of this fact and the provisions of Title 10 U.S.C. requiring the inclusion of appropriate number of reserve officers, he would have contacted his Judge Advocate General and General Counsel for an interpretation, and if in their interpretation the law required that, he would have done it.

With regard to the issue concerning the May 1975 message amendments to AR 624-100 and AR 635-100, counsel presented as Exhibit J a written outline of historical circumstances concerning changes, revisions, and messages to AR 624-100. It was pointed out in essence that there were three numbered changes to AR 624-100 which failed to incorporate numerous message revisions to the regulation which had been issued prior to the numbered changes; that the messages contained in part changes in promotion policy and on certain occasions such changes were buried at the end of the messages; that in addition certain message announcements contained policy statements concerning elimination of promotion categories pertaining to promotion of a particular group of officers, but apparently the Army applied such changes to other groups of officers and warrant officers without appropriate change in the regulation; that as an example the 1975 message amendments to AR 624-100 and AR 635-100 contained provisions at the end indicating retroactive provisions regarding nonselection by prior selection boards; that such action amounted to changing the rules of the game; that while the Army feels that the 1975 amendments were not retroactive, it seemed clear to the applicants and counsel that these particular amendments were not a retroactive regulation at all because of the existence of prior messages; and that however, the amendments did, in fact, change the rules which were in effect prior to May 1975, whether or not credence was given to these messages as being validly in effect after the actual changes to the regulation were issued.

With respect to the feelings of the applicants relative to the age discrimination problem, the depositions rendered by a fair number of selection board members reveal that all of the officers who testified denied that chronological age or Reserve component made any difference in their deliberations; that however, he believed that the testimony of Mr. Callaway was such that it could be fairly assumed that relative to the 15 percent secondary zone, there was very little discretion left, if any, for the selection

boards to come back with anything less than a full 15 percent; and that it was a very odd situation as to how the statistics came out on the selection boards and how they seem to be influenced to some extent by actions outside of the boards.

In Conclusion, counsel stated in substance that discrimination is always an insideous sort of thing; that it arises also relative to the problem of wrestling with 10 U.S.C. 266; that from Mr. Callaway's testimony it is obvious that nobody ever thought of the requirement of Reserve officers on the board; and that he submitted that after all this controversy was over and done with, there will be Reserve officers sitting on future selection boards.

Inasmuch as the Judge Advocate General's Office had not presented the Army's staff legal brief on the 10 U.S.C. 266 issue, permission with counsel's concurrence was granted The Judge Advocate General's Office to present an oral brief at the hearing, provided a written brief was submitted to the Board as soon as possible after the hearing and provided counsel was afforded an opportunity to submit any comments thereto for consideration of this particular matter. Counsel stated that otherwise, he was satisfied that the record was full and complete. During the hearing counsel submitted to the Board Exhibits "A" through "J" in further support of applicants contentions relative to the issues raised in this entire matter.

o. that on 11 December and 16 December 1975 in response to the Board's request at the conclusion of the hearing in the matter, The Judge Advocate General's Office submitted a legal opinion and a brief in opposition to the applications for relief on the grounds of 10 U.S.C. 266. It was opined that Section 266 provides that the boards convened for the purposes indicated therein shall include "appropriate numbers" from the Reserve components; that the legislative history of this provision discloses that the term "appropriate numbers," rather than a minimum number or fixed ratio, was employed by the Congress to cover situations where the same board was

used to consider both Regular and Reserve personnel; that in such cases, it was believed that the proportion of Reserve members on the board should be roughly equal to the proportion of Reserves being considered, but Congress also recognized that Reserve participation would not be possible in all instances, such as where no Reserve officer was senior in rank to the Reserve officers being considered; that in an effort to provide reasonable flexibility, the provision was written so as to allow Reserve representation on boards to be established by regulation of "the appropriate Secretary in accordance with standards and policies established by the Secretary of Defense," that subsection III.B, Department of Defense Instruction 1205.4, 23 June 1959, prescribes that "[t]he Secretaries of the military departments will, with due regard to availability of qualified reservists, pertinent statutory provisions, the nature of the board action, and the categories, regular and reserve which may be considered by the board, provide in the membership of the indicated boards, to the fullest practicable extent, a fair and adequate representation of members from the reserve components;" that paragraph 16*b*(5), Army Regulation 624-100, 29 July 1966, as changed, currently implements the foregoing statutory and regulatory authorities and provides that "[w]henever a zone of consideration includes nonregular officers, selection boards will, where practicable, include at least one officer of the Reserve components;" that these regulatory provisions, being in implementation of statute, are mandatory and may not be waived; that therefore, where selection boards of the type noted above have been, or are conducted without Reserve component representation, it is the opinion that the Army bears the burden of establishing either that (1) no Reserve officer was qualified for service, or (2) no qualified Reserve officer was reasonably available for service; that implicit in the first determination is the additional requirement that the Army demonstrate that the criteria establishing qualifications for service on a selection board are reasonable and do not operate intentionally and systematically to exclude Reserve officers from qualifying for service; and that should the Army be

able to establish either (1) or (2), i.e., no Reserve officers qualified or no qualified Reserve officer reasonably available, it is the further opinion that such a selection board would be lawfully constituted.

In furtherance to the foregoing legal opinion The Judge Advocate General's Office stated pertinently that the Secretary of Defense has set forth his policies and standards in DOD Instruction 1205.4 and Army Regulation 624-100 provides for the inclusion of at least one reserve member on the concerned promotion boards where practicable. The boards under consideration by the Army Board for Correction of Military Records in this matter did not have Reserve membership. In late 1967 two decisions were made by Headquarters Department of the Army, which may have affected Reserve membership on promotion selection boards. One decision was that, due to a critical shortage of funds, temporary duty (TDY) funds would not be available for brining officers to Washington, D.C., to sit on promotion boards. Previously board members were selected from throughout the Army in order to get wide representation. Restricting board membership to residents of the Washington, D.C., area would have effectively put a geographical/quantitative limitation on those officers eligible for board membership. The decision was also made to upgrade substantially the qualitative standards for board membership. Such a combination of qualitative and quantitative restrictions would have substantially reduced the pool of eligible and available reservists. Because of this reduced eligibility, few, if any, would have ever been identified for nomination. It should be made clear that nothing in the Army staff's investigation has revealed any decision or other action to leave Reserve officers off promotion boards with a malicious intent. Even if there had been a recognition of a statutory or regulatory preference for such membership which was overborne by fiscal consideration in 1967, as there appears there may have been, nothing has come to light which in any fashion shows that the decision was in any way meant to harm the promotion chances of Reserve personnel.

Viewing the situation in light most favorable to applicants, the facts do not justify relief. Even assuming that there was a conscious decision to leave Reserves off the boards due to fiscal constraints and further assuming that such decision resulted in a failure to specifically seek out Washington Area Reserves for promotion board duty, no Reserve officer can show specific prejudice to his opportunity for promotion. Indeed, the facts clearly militate strongly to the contrary. The depositions of a number of members of the promotion boards shows that the officers who sat on the boards did not favor Regulars over Reserves and, being aware that nonselected reservists would be required to leave active duty, often gave reservists the benefit of the doubt. It is also plain that each board has a reservoir of Reserve experience due to the careers of the officers making up the boards. Thus, it could hardly be argued that the boards were incapable of accurately judging the file of any particular reserve officer. Accordingly, it is apparent that even if error existed in the composition of the promotion boards, it was harmless error upon which no relief should be predicted; and

p. That on 19 December 1975 counsel submitted applicants memorandum in opposition to the Army staff submission and legal brief on Title 10, U.S.C. Section 266 which is marked as Exhibit "N" to these proceedings. In essence counsel cited the pertinent provisions of 10 U.S.C. 266 and DOD Directive 1205.4 implementing the statute, and contended that the statute and the DOD Directive required a fair and adequate Reserve representation on temporary Selection Boards convened pursuant to 10 U.S.C. 3442 and AR 624-100; that the defect in the composition of the 1974-1975 Selection Boards was jurisdictional and therefore their action is void; and that the "harmless error" theory is not applicable to the applicant's case. Numerous Federal court decisions were cited as references in support of the applicants contentions.

3. That Article II, Section 2, Clause 2 of the Constitution of the United States provides that the temporary appointments of commissioned officers in the RA shall be

made by the President alone in grades below Lieutenant Colonel and by the President, by and with the advice and consent of the Senate, in grades of Lieutenant Colonel and above.

4. That Title 10, U.S.C., Section 3012, provides, in pertinent part, that the Secretary of the Army, who is head of the DA, is responsible for and has the authority necessary to conduct all affairs of the Department of the Army; that he shall perform such other duties relating to Army affairs, and conduct the business of the Department in such manner, as the President or the Secretary of Defense may prescribe; and that he may prescribe regulations to carry out his functions, powers, and duties under this title.

5. That Title 10, U.S.C., Section 3442(c), provides, in pertinent part, that under regulations to be prescribed by the Secretary, appointments made under this subsection shall be made on a fair and equitable basis; and that selections shall be based upon ability and efficiency with regard being given to seniority and age.

6. That Title 10, U.S.C., Section 3297(d) provides that except as otherwise provided by law, promotion list officers and brigadier generals of the RA may be promoted to the regular grades of captain through major general only when recommended by a selection board; that a recommendation for promotion must be made by the majority of the total membership of the board; and that notwithstanding any other provision of law, a board that is to recommend officers for promotion whom it considers to be best qualified may recommend only those officers whom it also considers to be fully qualified.

7. That Title 10, U.S.C., Sections 3300 (a)(b)(c) provides pertinently that when promotion-list officers in the regular grade of first lieutenant, captain, or major are to be considered, under section 3299 of this title, by a selection board for promotion to the next higher regular grade to fill existing or anticipated vacancies, the Secretary of the Army may direct the board to consider officers in the

specified grade in the order of their seniority on the promotion list concerned, recommend those who are fully qualified for promotion, pass over those not so qualified, and continue this procedure until the number of officers specified by him is recommended; that when a promotion-list officer in the regular grade of first lieutenant, captain, or major must be considered under section 3299 of this title for promotion because of length of service, or because he is on a promotion list above an officer who must be considered for that reason, the Secretary may furnish the board a list of officers to be considered for promotion to the grade concerned, and direct the board to recommend the officers on that list whom it considers fully qualified for promotion; that instead of the procedures set forth in subsection (a) or (b), the Secretary may furnish to the board a list of promotion-list officers to be considered and may direct it to recommend a number specified by him for promotion; that the board shall recommend those officers whom it considers to be best qualified; and that however the number prescribed by the Secretary for the recommendation must be at least 80 percent of those listed for consideration for the first time.

8. That title 10, U.S.C., Section 3362, provides, in pertinent part, that the Secretary of the Army, or such authority as he directs, shall convene selection boards to consider reserve commissioned officers under this chapter; that each board shall be composed of at least five members who are senior in regular or reserve grade to, and who outrank, any officer considered by the board; that so far as practicable, at least one-half of the members of the board must be reserve officers; that a recommendation for promotion must be made by the majority of the total membership of the board; and that the Secretary of the Army shall prescribe regulations to carry out this chapter.

9. That Title 10, U.S.C., Section 3447, provides that the appointment of a person under sections 3442, 3444, and 3445 of this title shall be made without reference to any other appointment that he may hold in the Army; that temporary appointments of commissioned officers in the

Army shall be made by the President alone in grades below brigadier general, and by the President, by and with the advice and consent of the Senate, in general officer grades; and that the President may vacate at any time a temporary appointment in a commissioned grade.

10. That Title 10, U.S.C., Section 3449, provides that temporary promotions in warrant officer grades shall be governed by such regulations as the Secretary of the Army may prescribe.

11. That Title 10, U.S.C., Section 266 (a) provides that each board convened for the appointment, promotion, demotion, involuntary release from active duty, discharge, or retirement of Reserves shall include an appropriate number of Reserves, as prescribed by the Secretary concerned under standards and policies prescribed by the Secretary of Defense. (Examiner's Note: Under Index to Notes to this Section, Note Number 3 provides that all boards convened for appointment, promotion, release from duty, etc., shall include an "appropriate" number from the reserve components as prescribed by the appropriate Secretary in accordance with standards and policies established by the Secretary of Defense, does not require that any particular number or that a majority of the voting members of such boards be Reserve officers but leaves the matter to administrative discretion.)

12. That Title 10, U.S.C., Section 681(a), provides that except as otherwise provided in this Title, the Secretary concerned may at any time release a Reserve under his jurisdiction from active duty.

13. That Subsection III, DOD Instruction 1205.4, dated 23 June 1959, in implementation of Title 10, U.S.C., Section 266(a), provides that all boards convened for the appointment, promotion, demotion, involuntary release from active duty, discharge, or retirement of members of the reserve components shall be constituted as prescribed by the appropriate Secretary, and shall include appropriate numbers of members from the reserve components; that the intent of the Congress in this Section is clear, that

a member of a reserve component who is the subject of any of the indicated board actions shall be assured a fair representation of reserve membership on the board; that the Secretaries of the military departments will, with due regard to availability of qualified reservists, pertinent statutory provisions, the nature of the board action, and the categories, regular and reserve, which may be considered by the board, provide in the membership of the indicated boards, to the fullest practicable extent, a fair and adequate representation of members from the Reserve components.

14. That Army Regulation 624-100, dated 29 July 1966, which prescribed the policies and procedures for temporary promotion in the Army of the United States of commissioned and warrant officers on active duty provided, in pertinent part, that whenever a zone of consideration includes nonregular officers, selection boards would, where practicable, include at least one officer of the Reserve components; that promotion selection boards would base their selections on impartial consideration of all officers in the zone; that they would consider all factors, including ability, efficiency, seniority, and age; that the selection boards would use the "best qualified" method of selection for promotion to major through colonel (except for temporary promotion of medical and dental corps officers to major and lieutenant colonel), and to chief warrant officer, W-4 and chief warrant officer, W-3; that under this method, selection boards recommend not to exceed a specified number of officers whom they considered the best qualified to meet the needs of the Army of all fully qualified officers in the zone of consideration; that selection board action is administratively final, and that reconsideration for promotion would be afforded only in those cases where material error was present in the records of an officer when reviewed by a selection board; that the records of any officer within the primary zone of consideration for temporary promotion to any grade who was considered "not fully qualified" by a DA promotion selection board would be reviewed by Headquarters, DA; that this review

would determine whether or not he should be relieved from active duty or eliminated from the Army; that all nonregular officers considered for temporary promotion to lieutenant colonel, major or captain, or a warrant officer grade, who twice were reported by selection boards as "not fully qualified" (passed over) for temporary promotion to the same grade would be relieved from active duty, provided nine months or more elapsed between adjournment dates of selection boards; and that the Army's promotion system was designed to meet the Army's requirements for commissioned officers in the various commissioned grades to maintain the integrity of the promotion system by providing for fair and equitable advancement of officers throughout a full career in the Army, giving early advancement opportunity to the proven outstanding officers and eliminating the substandard or marginal officers as early in the career pattern as feasible; and to provide a proper promotion flow through the various grades to insure energetic, highly motivated officer corps and a high retention rate among the top quality officers.

15. That DA Message 876007, dated 14 August 1968, Subject: Temporary Promotion to Major and Lieutenant Colonel, provided, in pertinent part, that pending revision of AR 624-100 (Examiner's Note: This message was not published as a numbered change.) three categories would be utilized in the selection process to temporary major and lieutenant colonel, and were effective with the selection boards then in session; that those officers recommended for promotion would be in the category of "selected for promotion"; that those officers whose relative standing among their contemporaries did not warrant promotion at that time but whose present performance and indicated potential warrant possible future advancement would be in the category "selected for retention in grade"; that those officers whose current performance did not justify immediate advancement and whose indicated potential did not clearly sustain possibility of future advancement would be in the category "not selected"; that all nonregular officers

considered for temporary promotion to major or lieutenant colonel who twice were reported by selection boards as "not selected" for temporary promotion to the same grade would be relieved from active duty, provided nine months or more elapsed between adjournment of the respective selection boards which reported an individual "not selected"; and that it was requested widest dissemination of the foregoing change in policy to all officers.

16. That DA Message 960029, dated July 1970, Subject: Temporary Promotion to Major, Lieutenant Colonel, Chief Warrant Officer CW3 and CW4, provided, in pertinent part, that pending revision of AR 624-100 (Examiner's Note: This message was not published as a numbered change.) the selection for retention in grade category was reviewed for officers whose records clearly indicate the possibility for future advancement; that in the judgment of the board this presumes that these officers have the potential to develop so that selection for promotion should occur at the subsequent board; that those officers who have been selected for retention in grade for the previous designation of fully qualified — not recommended or not selected for promotion by a previous selection board considering them for promotion to the same grade would be categorized as "selected for promotion" or "not selected for promotion"; that this policy was effective 1 July 1970; and that it was requested widest dissemination of this change in policy.

17. That DA Message 202000Z September 1972, Subject: Revision to the Officer Secondary Zone Promotion System, provided, in pertinent part, that the Secretary of the Army had recently approved policy modifications pertaining to the secondary zone promotion of officers to the temporary grades of colonel, lieutenant colonel, major, chief warrant officer CW4 and CW3; that there continued to be no provision for secondary zone promotion to the grade of captain; that these modifications affected the secondary zones of eligibility, the allowable secondary zone selection rate, and the procedures utilized in secondary

zone selections; that the policy modifications were effective immediately and had been applied to the 1972 lieutenant colonel and colonel promotion boards; that as a general rule, secondary zone of consideration would include all officers who were two years junior in total active Federal commissioned service to the junior-ranking normal course officers in the primary zone of consideration; that the opportunity for selection from the secondary zone would be increased to all grades under consideration; that the total number of officers selected for promotion however, would not be increased under the revised system; that the percentage of the total promotion quota that could be selected from the below the zone for colonel, lieutenant colonel and major would be 15 percent and for chief officer W-4 and W-3 would be 7.5 percent; that a screening board, convened at the DA would evaluate all records in the announced secondary zone of consideration; that the board would be tasked to identify the officers who clearly surpass their contemporaries in potential and in breadth and depth of experience; that the board would identify a minimum of 150 percent and a maximum of 200 percent of the number authorized secondary zone selections for a grade; that concurrently, the Chief, Office of Personnel Operations, would be tasked to evaluate all records in the secondary zone that his agency determined had the qualifications outlined above; that the files of those identified would be further evaluated by the selection board for the particular grade; that the selection board could recommend for early promotion officers (within prescribed quota) determined to have the record, qualities and characteristics that identify them as "outstanding" and who clearly surpass their contemporaries and seniors in potential and breadth and depth of experience; and that every effort would be made by DA to insure that year groups have an equal number of opportunities (two or more) for secondary zone selection and to provide for predictable career progression.

18. That DA Message Date Time Group 191753Z May 1975, Subject: Change of AR 624-100, Promotion of Officers on Active Duty, provided in pertinent part, that

pending final publication of revised AR 624-100, Promotion of Officers on active duty, dated 29 July 1966, Section VII was changed to reflect that the records of any officer within a primary zone of consideration for temporary promotion to any grade was considered but not recommended for promotion by a DA selection board would be reviewed by Headquarters, DA; that this review would determine whether or not he should be eliminated from the Army under the provisions of Chapter 5, AR 635-100 and was in addition to the action described in paragraph 36; that appropriate action would be taken under the provisions of Section XVII, Chapter 3, AR 635-100, when an officer of the Reserve components who was considered for temporary promotion in the AUS to the grades of lieutenant colonel, major, or chief warrant officer CW4 or CW3 who was twice reported by a DA promotion selection board as not recommended for promotion provided there were at least nine months between the adjournment dates; that this change was effective upon receipt and was intended to clarify past and present DA policy concerning release or discharge from active duty of certain officers; that the wording of this change conformed to the intent behind, and practice under, the previous version; and that accordingly, failure to be recommended for promotion, both before and after the date of this message, counted towards the separation, elimination, or removal from active duty as appropriate.

19. That paragraph 3-65, Section XVII, AR 635-100, dated 19 February 1969, with changes, provided, in pertinent part that Reserve commissioned officers and chief warrant officers, W-3 or W-4, and AUS commissioned officers and chief warrant officers W-3 or W-4, who twice fail to be considered fully qualified, under AR 624-100, for promotion to the temporary AUS grade of captain, major, lieutenant colonel, or chief warrant officer W-3 or W-4, provided nine months or more elapsed between adjournment dates of selection boards, would be relieved from active duty on the 90th day after receipt of involuntary release notification, unless voluntary earlier release was

requested; that an officer eligible for retirement could apply for retirement, to be effective not later than the first day of the month following the month in which release was directed; that officers who would complete 18 or more years of active Federal service; and that in considering date would not be processed under this section, unless such action was approved by the Secretary of the Army, but would be retained on active duty until the last day of the month following the month in which they completed 20 years of active Federal service; and that in considering officers for AUS promotion, selection boards also determine whether those twice passed over for promotion should be considered for elimination from their Reserve commissions in addition to release from active duty.

20. That DA Message Date Time Group 191754Z May 1975, Subject: Change to paragraph 3-65A(1)(2) and (3), AR 635-100, Officer Personnel Separations, dated February 1969, provided in pertinent part that Reserve commissioned officers and Reserve warrant officers serving on active duty and Army of the United States Warrant officers, who fail a second time to be recommended for promotion to temporary AUS grade of captain, major, lieutenant colonel, or chief warrant officer W-3 or W-4, provided there were at least nine months between adjournment dates of selection boards, would be relieved from active duty on the 90th day after receipt of involuntary release notification unless earlier release was requested; that this change was effective upon receipt and was intended to clarify past and present DA Policy concerning release from active duty of officers two times nonselected for promotion to the temporary grades of lieutenant colonel, major, captain, chief warrant officer W-3 or W-4; that the wording of this change conformed to the intent behind, and practice under, the previous version; and than accordingly, failure to be recommended for promotion, both before and after the date of this message counted toward the separation, elimination, or removal from active duty as appropriate.

The Board Concludes:

1. That no evidence has been submitted to show that the findings and recommendations of the first captain to majors', Army of the United States Selection Board of January 1974, were ever formally submitted or approved by the Secretary. Thus, with respect to the first issue, former Secretary of the Army Callaway was exercising his discretionary powers and was acting within his statutory authority to appoint a new selection board in March 1974 to consider all eligible captains for temporary promotion (appointment) to the grade of major. To contend in effect, that promotion selection boards have the final decision on temporary promotions (appointments) appears to do violence to the Constitution and the statutes wherein The President, as Commander-In-Chief, is the sole appointing authority and The Secretary of the Army was, in the events leading to this matter, acting in the name of the President. That efforts to locate a formal list of officers recommended for promotion by the first Selection Board, if in fact such a list ever existed, have been unsuccessful; and that the fact that four officers can be identified as having been selected, merely resulted from a personal review of certain military records by the Secretary to ascertain the quality of some of the officers being considered. Therefore, there was, and is, no error or injustice with regard to the first issue.

2. That with respect to the second issue, the 1972 Secretarial approved revision to the officer secondary zone selection rates for promotion to the temporary grades of Lieutenant Colonel, Major, and Chief Warrant Officer (W-3) and (W-4), was clearly within the discretionary and statutory authority of the then Secretary of the Army at the time; and that its adoption and indorsement by former Secretary Callaway in 1974 during his term as Secretary of the Army served only to exercise his discretionary authority in this regard. The approved policy and regulatory revision concerned was properly established and has been followed by the Department since 1972. That although it would have been preferable to have published

such policy change as appropriate change to regulations, failure to identify the revision as a numbered change to AR 624-100, as contended by applicants and counsel, did not and does not render void or ineffective what was clearly intended and widely disseminated to all concerned as an approved policy and regulatory revision to the officer secondary zone selection rates in AR 624-100. While it appears that the Department was remiss in not maintaining the regulation concerned on a current basis, no error or injustice to the individuals concerned is considered to exist by reason of such failure.

3. That with respect to the third issue, the record before the Board does support the contention that an allowable maximum number of promotions from the Secondary Zone (SZ) was expressed by Secretary Callaway to the 1974 selection boards. However, the instructions to the selection boards concerned were open ended instructions, as evidenced by the Letters of Instructions (LOI) to those boards, which provided, in effect, that if the board could not recommend the number specified, or if the relative quality clearly indicated the number should be greater, the president of the board would notify the Secretary prior to adjournment. That based upon the testimony of Secretary Callaway before the Board, his October 1975 affidavit, together with the depositions given by selection board members, this Board is of the opinion that the Secretary of the Army acting within his statutory authority did not attempt to reserve a designated number of promotions in the SZ without due regard to seniority and age of officers in the Primary Zone (PZ) under a fair and equitable basis; further, a fair reading of his letter of instructions does not support the contention that such instructions were an attempt to preempt the discretionary powers of the selection boards to recommend selection of outstanding officers in the SZ (within the allowable maximum number authorized) who were clearly superior to those PZ officers they would displace. In the absence of proof to the contrary, there appears to be no error or injustice in this regard.

4. That with respect to issue number four, the evidence of record before the Board fails to support the contention that the Secretary of the Army's instructions to the selection boards constituted a directive to the boards to consider youth as a primary asset in the PZ as well as the SZ. That a thorough review of the entire Army promotion system under governing statutory and regulatory procedures, the implementing instructions and guidance to selection boards, and the percentage of senior officers selected for promotion reveals that due regard was given to seniority and age in both the primary and secondary zone selections. Further, the LOIs issued to the selection boards clearly established that youth was a major asset and primary consideration for selecting officers only from the SZ even though age in itself was not the sole basis for selection. That while the statistics and charts presented by the applicants in support of their contention of age discrimination was persuasive, failure to explain away such other factors impacting upon the selection process (efficiency, ability, scope and variety of tasks, degree and level of responsibilities, military and civilian education, and types and length of command assignments) renders the evidence as submitted of little meaningful substance, particularly with regard to a showing that age was a primary factor in nonselection. This conclusion is further substantiated by the written depositions presented by the selection board members in this matter. Accordingly, applicants' claim of age discrimination contrary to statutes and regulations appears to be without basis.

5. That with respect to the fifth issue, it is the considered judgment of the Board that the May 1975 message amendments to AR 624-100 and AR 635-100 did not serve to operate retroactively as alleged by the applicants; that such messages merely clarified and confirmed a long standing Departmental approved policy, that an officer who was not selected (recommended) for temporary promotion to the next higher grade would have such non-selection counted towards separation, elimination, or removal from active duty, as appropriate. The fact that

the applicants (through administrative oversight) were not properly informed that their first nonselection for promotion constituted a "passover" as defined in AR 624-100, such action did not connote that they were found "not fully qualified" to assume the position and responsibilities of the next higher grade. Instead, the record before the Board discloses clearly that the Selection Boards considered them fully qualified, but did not select them for promotion under the "Best Qualified" method. The applicants were twice not selected (recommended) for temporary promotion to the next higher grade under the "best qualified" method by the 1974 and 1975 Selection Boards under the Departmental approved promotion policy, as announced Army wide in August 1968 and July 1970 and further clarified and confirmed in May 1975. Therefore, the applicants were not deprived of due process of law or regulation regarding their promotion status, notwithstanding the remissfullness of the Department to incorporate previously announced approved changes of policy in numbered changes to AR 624-100 and AR 635-100.

6. That with respect to the sixth issue, Title 10, U.S.C., Section 266(a), does provide that all boards convened for appointment, promotion, demotion, involuntary release from active duty, etcetera, of Reserves shall include an appropriate number of Reserves as prescribed by the Secretary concerned under the standards and procedures established by the Secretary of Defense; that DOD Instruction 1205.4 dated 23 June 1959 does establish the policy that boards convened for the appointment, promotion, demotion, involuntary release from active duty, etcetera, of Reserves shall be constituted as prescribed by the appropriate Secretary and shall include appropriate numbers of members from the Reserve Components; and that AR 624-100 does prescribe that whenever the zone of consideration includes nonregular officers, selection boards will, where practicable, include at least one officer of the Reserve Components. That while it appears that the Department may not have complied with the intent of the law to have an appropriate number of Reserve Component

members on the 1974 and 1975 promotion boards when considering Reserve officers, the written depositions of the selection board members indicate that an individual's component had little or no bearing in their consideration and selection of an officer for promotion. Further it appears from a review of the entire matter that any decision or other action by the Department to omit Reserve Officers from promotion selection boards was not done in an arbitrary or capricious manner or with malicious intent to harm or prejudice the applicants' promotion chances as Reservists. That the Department's interpretation of "where practicable" have been construed to mean "qualified and available" to serve as a board member and such interpretation appears to be reasonable; however, the information submitted for consideration of this Board fails to show that there were no qualified Reserve Officers, or that such officers were not available to serve on promotion Boards; indeed, it appears from testimony submitted to this Board that a reasonably diligent search would have been successful in locating at least one Reserve Officer who met the qualification standards and was available to serve as a selection board member. That in viewing the situation in the most favorable light to the applicants, it is apparent the absence of Reservists from the 1974 and 1975 selection boards may have deprived them of consideration in a manner intended; that although the applicants have not shown that they have been harmed because there was no Reserve officer on the board, the failure to have a Reserve officer as a member of the selection board raises some doubt as to whether the applicants were accorded proper consideration for promotion under the 1974 and 1975 promotion criterion.

7. That in view of the foregoing findings and conclusions, the failure of the Department to appoint an appropriate number of Reserve officers as members of the 1974 and 1975 selection boards has resulted in an injustice to the applicants in that it has deprived them of consideration for promotion by selection boards containing Reserve officers.

The Board Recommends:

1. That new Department of the Army Promotion Selection Boards (AUS) be separately convened in composition and by calendar year with an appropriate number of Reserve officers as members thereof to reconsider all officers for promotion to the temporary grades of lieutenant colonel, major, chief warrant officer (W-3), and chief warrant officer (W-4) who were originally eligible for consideration in the primary zone for promotion to such grades in 1974 and in 1975 respectively; and that the letter orders of instruction and guidance pertaining to the primary zone previously furnished the original 1974 and 1975 selection boards be utilized as the criterion for consideration and selection.

2. That the military records of all eligible officers and warrant officers be appropriately reconstituted in the same manner as they would have been for consideration under the 1974 criterion and thence the 1975 criterion; that such reconstituted records omit reference to any prior selection or nonselection by the previous 1974 and 1975 Selection Boards or subsequent service; that the records as appropriately reconstituted for consideration under the 1974 selection criterion be referred to the newly constituted selection board for that calendar year; and that the records as appropriately reconstituted for consideration under the 1975 selection criterion be referred to another newly constituted selection board for that year.

3. That the names of officers and warrant officers who were previously nonselected for temporary promotion to the next higher grade under the 1974 and/or 1975 selection criterion and who are recommended for promotion by the newly constituted selection board should be reported to this Board for appropriate corrective action of the records of those who have filed an application in connection with this matter.

4. That the names of officers and warrant officers who were previously nonselected for temporary promotion to the next higher grade under the 1974 and/or 1975

selection criterion and who fail again to be recommended for promotion by a newly constituted selection board under the 1974 and/or 1975 selection criterion should be reported to this Board for such administrative action as may be deemed appropriate.

5. That officers and warrant officers who were previously selected for promotion under the original 1974 and/or 1975 selection criterion and who have been promoted or are awaiting promotion should not be prejudiced by depriving them of their current promotion status.

GORDON M. HOBBS
Chairman.

DEPARTMENT OF THE ARMY
Washington, D.C. 20310

27 Jan. 1976

SFMR — GADDINI, LOUIS D., 342-22-2633, et al.
KMIECIAK, THEODORE J., JR., 202-30-5433, et al
HOPKINS, JACOB A., 188-32-6456, et al.

MEMORANDUM FOR: CHIEF OF STAFF

Having approved the findings, conclusions and recommendation of the Army Board for Correction of Military Records, and under the provisions of 10 U.S.C. 1552, it is directed:

1. That new Department of the Army Promotion Selection Boards (AUS) be separately convened in composition and by calendar year with an appropriate number of Reserve officers as members thereof to reconsider all officers for promotion to the temporary grades of lieutenant colonel, major, chief warrant officer (W-3), and chief warrant officer (W-4) who were originally eligible for consideration in the primary zone for promotion to such grades in 1974 and in 1975 respectively; and that the letter orders of instruction and guidance pertaining to the

primary zone previously furnished the original 1974 and 1975 selection boards be utilized as the criterion for consideration and selection.

2. That the military records of all eligible officers and warrant officers be appropriately reconstituted in the same manner as they would have been for consideration under the 1974 criterion and thence the 1975 criterion; that such reconstituted records omit reference to any prior selection or nonselection by the previous 1974 and 1975 Selection Boards or subsequent service; that the records as appropriately reconstituted for consideration under the 1974 selection criterion be referred to the newly constituted selection board for that calendar year; and that the records as appropriately reconstituted for the consideration under the 1975 selection criterion be referred to another newly constituted selection board for that year.

3. That the names of officers and warrant officers who were previously nonselected for temporary promotion to the next higher grade under the 1974 and/or 1975 selection criterion and who are recommended for promotion by the newly constituted selection board should be reported to the Board for Correction of Military Records for appropriate corrective action of the records of those who have filed an application in connection with this matter.

4. That the names of officers and warrant officers who were previously nonselected for temporary promotion to the next higher grade under the 1974 and/or 1975 selection criterion and who fail again to be recommended for promotion by a newly constituted selection board under the 1974 and/or 1975 selection criterion should be reported to the Board for Correction of Military Records for such administrative action as may be deemed appropriate.

5. That officers and warrant officers who were previously selected for promotion under the original 1974 and/or 1975 selection criterion and who have been promoted or

are awaiting promotion should not be prejudiced by depriving them of their current promotion status.

MARTIN R. HOFFMANN,
Secretary of the Army.

DEPARTMENT OF THE ARMY

Army Board for Correction of Military Records

*Proceedings**

IN THE CASE OF:
LOUIS D. GADDINI — Docket Number: AC75-05512
342-22-2633 — 9 February 1977

I certify that hereinafter is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in the case of the above-named individual. A quorum was present during the hearing and deliberation. The following findings, conclusions and recommendations were adopted by the Board.

Applicant requests correction of military records as stated in application to the Board and restated herein.

The Board convened at the call of the Chairman on the above date and, following consideration of the case and having made its determination thereof, proceeded to other business.

Present:

Mr. Gordon M. Hobbs, Chairman, Mr. Oliver Kennedy, Member, Mr. Charles R. Woodside, Member, Mr. James C. Hise, Member, Mr. James L. Stroud, Member, Mr. Raymond J. Williams, Executive Secretary, Mr. E. E. Wilmeth, Exmainer.

The Board considered the following evidence:

Exhibit A — Application for correction of military records.

* Identical "Proceedings" were issued as to all applicants during the period October 1976 through December 1977.

Exhibit B — 10 December 1975 ABCMR Board Proceedings.

Exhibit C — 28 January 1976 Secretary of the Army decision.

The Board Finds:

1. That the applicant has exhausted all administrative remedies afforded by existing law or regulations.

2. That it incorporates in these proceedings and adopts by reference thereto so much of the Exhibits above, as pertains to the factual showing of the Department of the Army records which generally reflect:

a. that the applicant, who was considered by the Board for Correction of Military Records on 10 December 1975 as part of a class action, requests, in effect, that his military records be corrected to show him promoted to the grade of Lieutenant Colonel (LTC), Army of the United States (AUS), under the primary zone of either the 1974 or 1975 LTC, AUS, selection criteria with restoration to active duty, as applicable, and without loss of active duty service and pay and allowances; that the applicant in the class action alleged error or injustice in that:

(1) the Secretary of the Army's action in voiding the selection boards action in the first 1974 Captain to Major, AUS, selections was unlawful;

(2) the percentage of selections directed from the secondary zone was unlawful;

(3) the reservation of a designated number of promotions from the secondary zone was unlawful;

(4) the instructions to the selection boards constituted a directive to the boards to consider youth as a primary asset in the primary zone as well as the secondary zone;

(5) the 19 May 1975 messages amending AR 624-100 and AR 635-100 are not applicable to the applicants; and

(6) the apparent lack of any Reserve membership on any of the selection boards involved was contrary to 10 United States Code 266 and Department of Defense Instruction #1205.4, dated 23 June 1959; and

that such allegations are more fully addressed in the Board proceedings described above at Exhibit B;

b. that the applicant was not selected for promotion under either the 1974 or 1975 selection criteria for promotion to LTC, AUS, and was transferred to the United States Army Reserve;

c. that based upon the proceedings of this Board on 10 December 1975, as approved by the Secretary of the Army on 28 January 1976, it was determined, in part, that there was no error or injustice regarding the first five issues raised by the applicant; that however, with respect to the sixth issue the failure of the Department to appoint an appropriate number of Reserve officers as members of the 1974 and 1975 selection boards had resulted in an injustice to the applicant in that it had deprived him of consideration for promotion by selection boards containing Reserve officers; that pursuant to the Secretary's directive of 28 January 1976 the military records of all eligible officers were reconstituted in the same manner as they would have been for consideration under the primary zone of the 1974 and 1975 promotion criteria; and that reconstituted 1974 and 1975 LTC, AUS promotion selection boards for promotion to LTC, AUS were convened on 4 May 1976 and 14 September 1976, respectively, with an appropriate number of Reserve officers on the panel of the boards, and adjourned on 1 June 1976 and 17 September 1976, respectively; and

d. that on 29 June 1976 and 13 October 1976, respectively, Deputy Chief of Staff for Personnel advised this Board pertinently that the applicant was reconsidered for temporary promotion to the grade of LTC under the original criteria for the primary zone of the 1974 and 1975 selection boards by the reconstituted selection boards convened in accordance with the Secretary's directive; and

that the applicant had not been selected for promotion to LTC, AUS, by the 1974 and 1975 reconstituted promotion selection boards that adjourned on 1 June 1976 and 17 September 1976.

The Board Concludes:

1. That in light of the foregoing information and evidence heretofore submitted, the Board affirms its conclusions of 10 December 1975 that there was no error or injustice with regard to the first five issues considered in the proceedings at Exhibit B as approved by the Secretary on 28 January 1976 (Exhibit C).

2. That the 1974 and 1975 reconstituted LTC, AUS selection boards were properly constituted with Reserve officer membership pursuant to the Secretary's directive of 28 January 1976 and in accordance with 10 United States Code 266(a) as implemented by the Department of Defense Instruction 1205.4, dated 23 June 1959; and that the applicant was accorded proper consideration for promotion under the 1974 and 1975 LTC, AUS, selection criteria thereby.

3. That the applicant's records having been reconstituted in the manner prescribed by the Secretary and having been reviewed by properly reconstituted LTC, AUS promotion boards under the primary zone of the 1974 and 1975 criteria, it is reasonable to presume that had he been considered by properly constituted boards, he would not have been selected for promotion at the time concerned under the "best qualified" method.

4. That the applicant's nonselection for temporary promotion to the next higher grade tends to support the evidence heretofore submitted (a) that an individual's component had little or no bearing in his consideration and selection for promotion, and (b) that any decision or other action by the Department to omit Reserve officers from promotion selection boards was not done in an arbitrary or capricious manner or with malicious intent to harm or prejudice the applicant's promotion chances as a Reservist.

5. That in consideration of the foregoing findings and conclusions, the applicant's nonselection for promotion to LTC, AUS, under the 1974 and 1975 LTC, AUS, selection criteria was neither erroneous nor unjust.

The Board Recommends:

That in the case of LOUIS D. GADDINI, his application for correction of military records be denied.

GORDON M. HOBBS,
Chairman.

In the United States Court of Claims

No. 131-77

(Decided May 16, 1979)

Major Leo D. Doyle, et al. v. The United States*

No. 275-77

Major Joe L. Adams, et al. v. The United States*

Robert M. Wright, attorney of record, and *Keith A. Rosenberg,* of counsel, for plaintiffs. *Whiteford, Taylor, Preston, Trimble & Johnston,* of counsel.

* In case No. 131-77 the 12 plaintiffs are: Maj. Leo D. Doyle (1), Maj. Louis Gaddini (2), Maj. John D. Gardner (3), Maj. Bobby Eugene Hill (4), Maj. Eldon Craig Loe (5), Maj. Robert W. Mandelstam (6), Maj. Lois Martin (7), Maj. William J. Riddel (8), Maj. James H. Rober (9), Maj. L. D. Truitt (10), Maj. Charles M. Tryon, Jr. (11), and Maj. Kenneth P. Winchester (12).

In case No. 275-77 the 29 plaintiffs are: Maj. Joe L. Adams (1), Maj. Robert D. Ayers (2), Maj. Lyndel Barnes (3), Maj. Florencio Barrera (4), Maj. Jerry H. Brown (5), Maj. Paul Brown (6), Maj. Linwood Carr (7), Maj. Orlando Cruz-Ibarra (8), Capt. Lyle R. Daun (9), CW2 Clayton L. Dean (10), Capt. Paul T. Doherty (11), Maj. Carroll D. Durant (12), Capt. James E. Fusha (13), Maj. James E. Goldsmith (14), Capt. Daniel J. Hill (15), Maj. John Iiames (16), Maj. Jack L. Keadle (17), Capt. Arthur H. Kelley (18), Capt. Theodore J. Kmieciak (19), Maj. Robert H. Larsen (20), Maj. Robert A. Matthews (21), Maj. Vincent Meulemans (22), Maj. Cecil Mills (23), Maj. Jack Park (24), Maj. Vernon Phillips (25), Maj. Ken Polston (26), Capt. Charles P. Schell, Jr. (27), CW2 Robert E. Serafin (28), and Maj. Alfred J. Tomczyk (29).

George M. Beasley, III, with whom was *Assistant Attorney General Barbara Allen Babcock,* for defendant. *Marc J. Fink, Capt. L. Neal Ellis,* Department of the Army, and *Capt. Louis Davis,* Department of the Army, of counsel.

Before FRIEDMAN, *Chief Judge,* DAVIS, NICHOLS, KASHIWA, KUNZIG, BENNETT, and SMITH, *Judges, en banc.*

ON PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT AND DEFENDANT'S CROSS-MOTIONS FOR SUMMARY JUDGMENT

BENNETT, *Judge,* delivered the opinion of the court:

In these consolidated cases, before us on cross-motions for summary judgment, plaintiffs, formerly commissioned officers in the United States Army Reserve (USAR), contest their release from active duty resulting from their twice having been passed over for promotion by selection boards in 1974 and 1975,[1] and contend that the decision of the Army Board for the Correction of Military Records

[1] The *Adams* case originally was filed in the United States District Court for the District of Columbia. *Larsen v. Hoffman,* Civ. No. 76-0610; *Bryner v. Hoffman,* Civ. No. 76-0924. The district court consolidated these two cases and transferred them to this court on March 30, 1977, upon concluding that it lacked jurisdiction over them. *See* 28 U.S.C. § 1406(c).

(Correction Board) in denying their claims was arbitrary, capricious, and contrary to law. They allege that defects in the composition and decision of those boards render their separation unlawful, and they seek back pay from the dates of their release, the correction of their records, and restoration to active duty commissioned status. We conclude that plaintiffs' claims are justified *in part* and grant judgments accordingly.

I

In the Officer Personnel Act of August 7, 1947, ch. 512, 61 Stat. 795, Congress changed the prior practice under which Army officers below the grade of colonel were promoted solely on the basis of seniority. The new system provided for the selective promotion of those Regular and Reserve Army officers on the basis of their qualifications for the next highest grade. The process was accomplished through selection boards (composed of at least five officers) which chose from among all of the officers eligible for promotion because they had been in a particular rank for a certain time.

The selection board procedure is used for promotion of both Regular and Reserve officers, and covers promotions to temporary as well as permanent rank.[2] In the case of selection boards convened for the recommendation of Reserve officers for promotion to permanent rank, "[s]o far as practicable, at least one-half of the members of the board must be Reserve officers." 10 U.S.C. § 3362(b). An essential element of this merit promotion system is the provision that officers who have not been recommended for promotion to permanent rank by two consecutive selection boards are released from active duty. 10 U.S.C. §§ 3299(h), 3303; Army Reg. No. 624-100, ¶ 36 (July 29, 1966) (hereinafter Army regulations cited as AR).

Separate selection boards consider promotions to permanent rank for Regular and Reserve officers. In the case of

[2] All officers have a permanent rank. Officers on active duty may be promoted to a higher temporary rank than their permanent one. An officer temporarily promoted retains his permanent rank.

promotions to temporary rank, however, the same selection board may consider both Regular and Reserve officers and select the total number authorized for promotion from within this combined group. Statute requires that whenever a board considers the promotion of Reserve officers, such board "shall include an appropriate number of Reserves, as prescribed by the Secretary concerned under standards and policies prescribed by the Secretary of Defense." 10 U.S.C. § 266(a). Regulation requires that Reserve officers, twice passed over for promotion to the same temporary rank, be released from active duty or retired if appropriate.[3]

In the case of temporary promotions (unlike permanent ones), the officers whom the board considers are divided into two categories: those in the primary zone and those in the secondary zone. An officer's placement in one or the other zone depends upon the length of time he has served in the rank held. Officers in the secondary zone have been in rank a shorter time than those in the primary zone. The officers in the primary zone are viewed as the group that can provide sufficient officers to meet the Army's need in the next year for officers in the higher grade. The secondary zone, on the other hand, is designed to enable the Army to advance younger and more capable officers ahead of both their contemporaries and those in the primary zone. *See* AR 624-100, ¶¶ *2i, 2j,* 14.

The Secretary each year sets the maximum number of officers the selection board may promote, and regulations specify the maximum percentage that may be selected from the secondary zone. AR 624-100, ¶ 23*b*. Since the

[3] Congress specified the selection board procedure and release from active duty or retirement after two passovers only in the case of promotions to permanent rank. Congress left it to the Secretary to determine the procedures for promotion of officers to temporary rank, 10 U.S.C. § 3442(c), and the Secretary provided by regulation that selection boards would also handle temporary promotions, AR 624-100. Under the authority of 10 U.S.C. § 681, the Secretary provided by regulation that in the case of Reserve officers two passovers for promotion to temporary rank would result in release or retirement. AR 635-100, ¶ 3-65*a* (Jan. 14, 1975).

officers in the secondary zone are junior in rank to those in the primary zone, those selected from the secondary zone must be better qualified than the officers in the primary zone who were not selected. Because of the limit on the total number of officers to be promoted, each selection from the secondary zone precludes a selection from the primary zone.

The nonselection of an officer in the secondary zone, unlike that of an officer in the primary zone, does not constitute a passover for promotion for purposes of the mandatory separation after two nonselections. AR 624-100, ¶ 25. At some point, however, an officer in the secondary zone who has not been promoted will be transferred to the primary zone.

Proceedings before the selection board, which are secret, involve a review of the written records of the officers. No officer or his representative may appear before the board, although an officer may write the board concerning any matters believed important to a proper consideration of his record. 10 U.S.C. §§ 3297(e), 3362(f); AR 624-100, ¶¶ 16, 24; AR 135-155, ¶ 3-10 (Aug. 30, 1974). Because of the secrecy of selection board proceedings, there is some uncertainty concerning the mechanics of the selection process. Usually, each member of the board evaluates each officer's file independently and without discussing it with other members, and then gives the officer a numerical rating; the officers with the highest scores are selected. If, at the point where the limit on the number of promotions is reached, there are more officers with the same score than can be promoted, the board members reevaluate those officers together with those whose scores are immediately above and below. In such reevaluation they may discuss individual officers. *See* Ford, *Officer Selection Boards and Due Process of Law*, 70 Mil. L. Rev. 137, 148-51 (1975).

The regulations require that the boards recommend for promotion to the grades of major through colonel and chief warrant officer those officers determined to be "best qualified" for promotion, *i.e.*, those to whom the selection board has given the highest rating.

Two administrative procedures are available for officers who wish to challenge their nonpromotion by a selection board. If the Army concludes that the officer's record before the selection board contained material error, a standby advisory board will be convened. AR 624-100, ¶ 18*b*; AR 135-155, ¶ 3-14*b*. Correction boards sometimes refer cases to standby boards and review their determinations. A standby board compares an officer's corrected record with randomly selected records of other officers, some of whom the selection board promoted and others it rejected. If, upon such reconsideration, the standby advisory board gives the rejected officer a rating high enough to equal the ratings of the officers before it whom the selection board has selected, he is promoted.

A nonselected officer also may seek relief from the Army Board for the Correction of Military Records. That board implements 10 U.S.C. § 1552, which authorizes the Secretary, acting through a board of civilians, to change any serviceman's military record to correct an error or remove an injustice. Application to the board does not, however, stay any other proceedings which are pending against the applicant. AR 15-185, ¶ 9 (June 4, 1974). Although in certain circumstances the board may take final action on behalf of the Secretary, *see* Ford, *supra*, 70 Mil. L. Rev. at 154, in most cases the board merely makes recommendations to the Secretary, who has final decisional authority.

In 1974 and 1975 the plaintiffs were Reserve officers serving on active duty in the grades of major, captain, and chief warrant officer, CW2. Because of the time they had been in rank, they were in the primary zone for promotion. This meant that if they were twice not promoted for the same temporary rank they would be released from active duty and retired if appropriate.

Plaintiffs were considered by 1974 and 1975 selection boards (the size of which ranged from six to 15 members) but were not among those selected by those boards for temporary promotion. As a result, they were notified that they would be released from active duty 90 days after the

date of notification.[4] None of the 1974 and 1975 boards had any Reserve members.

The 1974 selection boards for the three grades here involved selected for promotion 1,072 of the 1,944 officers in the primary zone they had considered for promotion (55.1 percent). For the 1975 boards, the figures were 1,487 of the 2,901 officers considered (51.3 percent).

Subsequent to the decision of the selection boards, the plaintiffs discovered that the boards had not included any Reserve officers. In the latter part of 1975, plaintiffs filed applications with the Correction Board to set aside their nonselection. They contended that (1) the lack of Reserve members on the selection boards required invalidation of the boards' decisions denying them promotion, and (2) that the boards also had misapplied the regulations governing the standards for promotion. The plaintiffs informed the Secretary of the Army of the defect in the composition of the selection boards, but the Secretary refused to retain the plaintiffs on active duty until the Correction Board decided their cases. With a few exceptions,[5] plaintiffs and other passed-over officers were discharged from active duty.

The Correction Board concluded that, although the omission of Reserve officers from the 1974 and 1975 selection boards "was not done in an arbitrary or capricious manner or with malicious intent to harm or prejudice the applicants' [plaintiffs'] promotion chances as Reservists," nevertheless the absence of Reservists from those boards "may have deprived them [plaintiffs] of consideration in a manner intended; that although the applicants have not shown that they have been harmed because there

[4] Three of the plaintiffs had completed more than 18 years of active duty at the time of the second nonselection and would be retained on active duty until they had completed 20 years of service and were eligible to retire. AR 635-100, ¶ 3-65*d*.

[5] *See* note 4 *supra*. Several passed-over officers had been temporarily retained on active duty for various reasons. These officers' active duty status was extended after the Secretary adopted the recommendation of the Correction Board.

was no Reserve officer on the board, * * * [that fact] raises some doubt as to whether the applicants were accorded proper consideration for promotion under the 1974 and 1975 promotion criterion." The Correction Board further concluded that "the failure of the Department to appoint an appropriate number of Reserve officers as members of the 1974 and 1975 selection boards has resulted in an injustice to the applicants in that it has deprived them of consideration for promotion by selection boards containing Reserve officers." The Correction Board rejected plaintiffs' contention that the selection boards had misapplied the regulations.

The Correction Board recommended that new selection boards with an appropriate number of Reserve members be convened to reconsider all officers from the primary zones who were eligible for promotion to the temporary grades of lieutenant colonel, major, and chief warrant officer in 1974 and 1975; that the instructions to the original 1974 and 1975 selection boards be utilized "as the criterion for consideration and selection" by the new boards; that the military records of all eligible officers be reconstituted as they were in 1974 and 1975, without any reference to action by the original selection boards or to any subsequent service; that the new boards for 1974 and 1975 consider all the officers whom the original boards for each of those years had considered and report to the Correction Board for appropriate action the officers it recommended for promotion and those it did not select; and that no officers whom the original selection boards had selected for promotion be denied that advancement.

In January 1976, the Secretary of the Army approved the Correction Board's findings and conclusions and directed that its recommendations be carried out. Shortly thereafter the Department announced that officers already separated following their nonselection by the original selection boards would not be recalled to active duty during this procedure, but that officers who had not been separated as of the date of the Secretary's approval of the Correction Board's decision would remain on active duty

until the reconstituted boards had completed their proceedings. Since the plaintiffs had been released from active duty prior to the Secretary's action, they were not recalled.

The reconstituted 1974 and 1975 selection boards convened from May 1976 through August 1976. The reconstituted boards considered de novo each officer in the primary zone whom the original boards had considered, including those whom the boards had selected. Except in one respect,[6] the reconstituted boards followed the same procedures and standards as the original boards, and each board that considered Reserve officers had one or more Reserve members.

Although the reconstituted boards recommended promotion of some officers who were not selected by the original boards, none of the plaintiffs was among those recommended for promotion by either of the boards reconstituted for 1974 or 1975. Upon reviewing the recommendations of the reconstituted boards with respect to those officers, the Correction Board concluded it was "reasonable to presume that had * * * [these officers] been considered [initially] by properly constituted boards, * * * [they] would not have been selected for promotion" and that the plaintiffs' nonselection for promotion under the 1974 and 1975 "selection criteria was neither erroneous nor unjust." The board reaffirmed its previous rejection of plaintiffs' other objections to their nonselection. It concluded that the plaintiffs were not entitled to any relief. In November 1976, the Assistant Secretary of the Army for Manpower and Reserve Affairs approved the Correction Board's findings, conclusions, and recommendations.

II

We hold, as the defendant concedes, that the original 1974 and 1975 selection boards were improperly constituted because they did not include any Reserve officers as members. Section 266, title 10, of the United States Code, requires that "[e]ach board convened for the * * * promo-

[6] The reconstituted boards, unlike the original boards, did not consider for promotion any officer in the secondary zone.

tion * * * of Reserves shall include an appropriate number of Reserves" as the Secretary of the Army prescribes under standards and policies prescribed by the Secretary of Defense.[7] Department of Defense Instruction No. 1205.4, dated June 23, 1959, provides that the members of boards for the promotion of Reservists shall include "to the fullest practicable extent, a fair and adequate representation" of Reserve members. AR 624-100, ¶ 16*b*(5), provides that where non-Regular officers are being considered, the selection board will, "where practicable," include at least one Reserve officer.

As the case comes to us, there is no indication or even claim that Reserve officers were not included on the original 1974 and 1975 boards because they were unavailable or their appointment was otherwise not practicable. The statutory command is unequivocal that the boards considering Reservists for promotion "shall include an appropriate number of Reserves." The absence of Reserve officers from these boards, contrary to the statutory requirement and the implementing directive of the Secretary, constituted a legal error that the Correction Board was authorized to correct.

The plaintiffs contend that once we determine that the absence of Reservists on the board constituted a legal error, that is the end of the matter. According to the plaintiffs, decisions of the Supreme Court and of this court establish that a defect in the composition of a military board or tribunal automatically invalidates the entire proceeding and requires a new one. They assert that when the Secretary concluded that the original selection boards had been improperly constituted he was required to treat their proceedings as a nullity, to reinstate the plaintiffs on

[7] The Senate report on the statute explained: "The term 'appropriate numbers' rather than a fixed ratio is used, since the same board may be considering both Regular and Reserve personnel. In such case the proportion of Reserve officers on the board should be roughly equal to the proportion of Reserves being considered." S. REP. No. 1795, 82d Cong., 2d Sess., *reprinted in* [1952] U.S. CODE CONG. & AD. NEWS 2005, 2042.

active duty at the rank they held when they were released, and to begin the entire promotion procedures a anew. In short, plaintiffs contend that there is no room for the doctrine of harmless error in this case, and that they are now entitled to back pay and restoration to active duty commissioned status.

We acknowledge that the doctrine of harmless error has an honored place in jurisprudence. Indeed, it has been applied in this court and even urged in circumstances where some have thought it should have been applied, but it was not. *Ryder v. United States,* 218 Ct. Cl. ——, ——, 585 F.2d 482, 489 (1978). However, in the circumstances of the present case, as will be demonstrated, it has no proper place. We conclude, however, that the Secretary's and Correction Board's handling of the problem created by the widespread violations of the statute and regulation in the composition of the 1974 and 1975 selection boards was, in part, a reasonable and permissible attempt to deal with the serious situation those violations posed for the military. We fault the Correction Board only for its failure to grant these plaintiffs the full and complete relief to which they were legally entitled because of the serious violation of their legal rights.

This is not the first case in which this court has had to consider what effect defective composition of a board had on that board's action. *See Ricker v. United States,* 184 Ct. Cl. 402, 396 F.2d 454 (1968); *Henderson v. United States,* 175 Ct. Cl. 690 (1966), *cert. denied,* 386 U.S. 1016 (1967). In *Henderson,* a faculty board (the Graham Board) eliminated Henderson from a pilot training program on the basis of his flying deficiencies. The governing Air Force regulations provided that a quorum of the board was three voting members and required that voting members be senior to the person being investigated. The regulation provided that this latter requirement could not be waived. The board had only three voting members, and one of the members (Lt. John L. Krill) was junior in rank to Henderson. The court held that "the presence of Krill on

the Board was a defect that could not be, and was not, effectively waived; and that the Board did not meet the requirement that a quorum constituted of no less than three eligible voting members be present at all sessions." *Henderson v. United States, supra,* 175 Ct. Cl. at 701. The court stated further:

> * * * despite the fact that the record of the proceedings of the Board clearly shows that its findings and recommendations were fully justified, it must be held that the Graham Board was improperly constituted. It follows that under the Air Force's own regulations, *supra,* the Graham Board was without jurisdiction to hear plaintiff's case and its proceedings void *ab initio.* [*Id.*]

In *Ricker,* the plaintiffs were retired as Regular Navy captains when a continuation board failed to recommend them for continuation on the active list. By statute, 10 U.S.C. § 5702(f), no member could serve on two successive boards convened to consider promotion or continuation of officers of the same rank. One of the three members of the board that declined to recommend the plaintiffs' continuation on active duty had been a member of the prior board that considered continuation on active duty of officers of the same rank.

The court held that the board "was illegally constituted" "in direct violation of the statutory mandate" and that the proceedings were therefore "fatally defective." *Ricker v. United States, supra,* 184 Ct. Cl. at 405-08, 396 F.2d at 455-57. It rejected on three grounds the defendant's argument that the plaintiffs were not prejudiced by the defect in the membership of the board because the plaintiffs had appeared only once before a continuation board: (1) the ban against an officer sitting on successive boards was an attempt "to prevent a general form of prejudice" by "lessen[ing] the probability of cliques becoming established and perpetuated"; (2) *Henderson* held that the illegally constituted board "rendered the proceedings fatally defective"; and (3) since the agency violated not its own regulations but an Act of Congress, "[i]t follows, *a*

fortiori, that the separations were illegal." 184 Ct. Cl. at 406-07, 396 F.2d at 456-57.

In neither *Henderson* nor *Ricker* did the court find that it was possible to sustain the compositionally defective board's action by proof of the harmlessness of the error. In *Henderson*, the unwaivable regulatory requirement that a board passing on an officer could not be composed of an officer junior in rank to the officer under consideration was aimed at affording rank its proper dignity and at preventing a general form of prejudice officers might consciously or unconsciously entertain toward their superiors. In *Ricker*, the statutory requirement that a particular officer not sit on two consecutive boards for the same rank also was aimed at attempting to prevent a general form of prejudice. Both the regulation and the statute were the result of a considered decision as to the fairness of a particular process.

The first proposition to underscore in this case is that the Army's error in failing to have Reservists on the original selection boards was not merely technical, formal, or trivial, but serious, substantial, and directly related to the purpose and functioning of selection boards. Congress was concerned that the military establishments (with their significant sector of Regular officers) not discriminate against Reserves.[8] That is obviously why 10 U.S.C. § 266(a) requires that certain boards which consider Reserves "shall include an appropriate number of Reserves * * *." Reserve members of the selection boards were to be there to minimize the chance that conscious or unconscious bias against Reserves, as such, would enter into the selection process. Like *Henderson* and *Ricker*, the requirement is an important component in ensuring the fairness of the process. Such a requirement confers the right on officers to be considered by a proper board.

[8] 10 U.S.C. § 277 declares:

"Laws applying to both Regulars and Reserves shall be administered without discrimination—

"(1) among Regulars;

"(2) among Reserves; and

"(3) between Regulars and Reserves."

It has been suggested that the case differs from *Henderson* because the Army itself has recognized the less rigid character of this requirement by providing that Reservists are to be assigned to those boards only where practicable. We see nothing to support this dissolution of the statutory requirement. The statute is unequivocal that the boards *shall* include an appropriate number of Reserves. There is absolutely no indication that this command is unimportant or waivable at the discretion of the Secretary.

Defendant vigorously argues that our decisions in *Henderson* and *Ricker* are incorrect as a matter of law and asks us to overrule them. It asserts that, under present law, even in the case of constitutional errors, an employer has the right to prove the harmlessness of the error. It notes that the errors herein were statutory violations, not constitutional violations and that officers do not have a protected property interest in continued employment under the fifth amendment. Thus, defendant's argument goes, plaintiffs are certainly not entitled to more protection for statutory rights than is afforded constitutionally protected rights. Defendant further urges us to adopt the holdings of other courts which have followed the doctrine of harmless error in the military pay field.

We do not believe that defendant's general propositions affect our holdings in *Henderson* and *Ricker*. Defendant places principal reliance on the Supreme Court's decision in *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274 (1977), where a school teacher's exercise of his substantive constitutional right to free speech was found to be a substantial or motivating factor in a school board's decision not to rehire him. The Court ruled that, unless there was a direct causal connection between the teacher's exercise of his constitutional rights and the decision not to rehire him, the decision to rehire would not "amount to a constitutional violation justifying remedial action." *Id.* at 285. The Court placed on the defending party the burden of showing that the decision would have been the same even in the absence of the protected conduct.

The holding in *Mt. Healthy,* applying the "harmless error" test to substantive constitutional rights, is analogous to our recent decisions in the military pay area in *Sanders v. United States*. Ct. Cl. No. 157-74 (Feb. 21, 1979), and *Skinner v. United States,* Ct. Cl. No. 305-75 (Feb. 21, 1979). In those cases, we held that officers' separations based on two passovers for permanent promotion were illegal where the selection boards had not considered them on the basis of a record which portrayed their service careers on "a fair and equitable basis" as the statutes, 10 U.S.C. §§ 3442(c), 8442(c), required. *Sanders v. United States, supra,* slip op. at 14. Though we did not adopt *Mt. Healthy's* allocation of burdens of proof for military pay cases, we did implicitly follow *Mt. Healthy* in concluding that the doctrine of "harmless error" applied and that the plaintiffs were not entitled to recover if there were no relation between the inaccuracy in their records and the decision not to promote them. Of course, we did find such a nexus existed in those cases.

The error in this case, however, is not a violation of the plaintiffs' substantive rights but rather a violation of the plaintiffs' rights to fair procedure or process. We are not unmindful of the fact that the due process protections of the fifth amendment have been sparingly extended to government employees, but that problem is immaterial to this case. The error is the violation of procedures instituted by statute and regulation, and, though federal employees *may* not be entitled to any procedure not established by Congress or agency, we have always held that they are entitled to such procedure that has been so provided.

Since this case presents the issue of procedural errors in the decision-making process of a selection board, we find those cases dealing with the violation of constitutional procedural rights to be more analogous. The Supreme Court has recognized that even in the case of constitutional error occurring in a criminal trial, not every such error requires "the automatic reversal of the conviction"; a conviction will be upheld if the "federal constitutional

error * * * was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 22, 24 (1967). *See, e.g., Harrington v. California,* 395 U.S. 250 (1969) (violation of sixth amendment right of confrontation); *United States v. Parker*, 549 F.2d 1217, 1221 (9th Cir. 1977), *cert. denied*, 430 U.S. 971 (1977) (prosecutor's comment on defendant's failure to testify, in violation of fifth amendment).

Some constitutional rights, however, are "so basic to a fair trial that their infraction can never be treated as harmless error * * * ." *Chapman v. California, supra,* 386 U.S. at 23 (coerced confession, right to counsel, impartial judge). These include cases in which compositional defects are found to exist in respect to juries. *See, e.g., Whitus v. Georgia*, 385 U.S. 545 (1967). Two justifications for the rule of automatic reversal are generally advanced. First, some errors are so inimical to judicial or fair process that their violation cannot be tolerated under any circumstances. Application of the test of harmless error would result in the dilution of the afforded protection. Second, a court, in the case of some errors, such as the improper composition of a jury or the bias of a judge, "has no way of evaluating the effect of the error on the judgment in the dark of what might have been but never was, * * *." R.J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 66 (1970).

Though the proceeding involved herein is evaluational, not accusatory, and the error statutory, not constitutional, we do not for these reasons believe that these plaintiffs are entitled to any less protection. Decisions of selection boards have important consequences for those considered. They are either promoted to higher rank and pay or are terminated and lose their employment and pay. The statute explicitly commands that selection boards shall be composed of an appropriate number of Reserve officers so that Reserve officers will not be prejudiced and so that Congress' purpose that the nation is protected by a military composed of those officers best qualified regardless of their status as Regular or Reserve officers, is carried out. We believe that Congress' purpose would be

thwarted unless a Secretary is aware that this is a statutory requirement that cannot be waived.

Moreover, we believe that the second justification for the automatic reversal rule, that it is not possible for a reviewing body to determine what effect the error had on the judgment of the original proceeding, forces us to conclude that the doctrine of harmless error cannot be applied to this type of procedural error. Recommendations for promotion are the product of subjective, secret evaluations of officers by officers. AR 135-100, ¶ 18. The task imposed on selection board members is to determine within the framework of their own experience and special insights and subject to the standards prescribed by the Secretary, what officers among the many qualified are "best qualified" to serve in a promoted capacity. Courts are not qualified nor is it desirable for them to delve into the selection boards' exercise of discretion. Judgment was exercised by the selection boards in the absence of the judgment of the appropriate number of Reserve officers required by statute. In no way can the proper influence of Reserve officers be injected into the original process, after the fact, in order to determine the effect it might have had on the judgment of the board. Thus, the procedural violation penetrates to the heart of the process Congress deemed necessary for fair judgment in selecting officers for promotion, which is presumed prejudicial in accordance with the policy of the statute. The defective process can be corrected, however, by giving the adversely affected officers the opportunity to be promoted in strict compliance with the law. But this new opportunity does not demonstrate that the error was harmless nor render the original error harmless as to those officers passed over by the new procedure; instead, it is simply the best remedy that legal ingenuity can provide.

Thus, though new procedures were provided here, we reject defendant's contention that the reconstituted selection boards were merely an evidentiary proceeding into the question of whether the error was prejudicial and that the results of the new procedure demonstrate the harmlessness of the error as to the plaintiffs. Nor is this contention strictly borne out by the facts. The reconstituted selection boards were a completely new process, recommended by the Correction Board, because the plaintiffs were not considered for promotion in the manner intended by the statute and regulation. The Correction Board could not determine, based on the evidence then before it, that the error was not prejudicial.[9] The Correction Board, therefore, found that this was an injustice.[10] The Secretary, on the recommendation of the Correction Board, ordered that new selection boards be set up and that appropriate corrective action be taken by the Correction Board upon the recommendation of the reconstituted selection boards. It is wrong to conclude that a completely new process, which renders a new decision with important consequences, is an evidentiary hearing into the question of prejudice; it is, rather, what it obviously appears to be — a remedy to correct an admitted mistake. Thus, the Correction Board's surprising contention, when it rejected plaintiffs' claims, that the compositional defect was harmless, cannot stand.

Defendant has cited cases in the military pay area which have accepted a new, subsequent process as proof of the harmlessness of error in the selection process. Several of these cases deal with the same procedural defect complained of here. *See Dilley v. Alexander,* 440 F. Supp. 375 (D.D.C. 1977), *rev'd,* No. 77-1789 (D.C. Cir. Feb. 26, 1979); *Fuller v. Alexander,* 440 F. Supp. 380 (D.D.C. 1977); *Whitehead v. Alexander,* 439 F. Supp. 910 (D.D.C. 1977); *Gober v. Hoffman,* Civ. No. 77-17-COL (M.D. Ga. Aug. 23, 1977). Since oral argument was heard in this case, *Dilley* was reversed by the United States Court of Appeals for the District of Columbia which concluded that the error herein required automatic reversal. We agree with the *approach*

[9] Defendant also submitted affidavits from some of the members of the original boards to the effect that each officer was considered fairly for promotion. We do not accept these self-serving statements as probative evidence of the lack of prejudice in the original proceedings.

[10] We note, however, that this was not simply an injustice, but serious legal error.

taken by the court of appeals in *Dilley* for the reasons heretofore stated and do not accept that taken in *Gober* (in effect, the only remaining precedent for the contrary position).

In *Coughlin v. Alexander,* 446 F. Supp. 1024 (D.D.C.), *aff'd without opinion,* No. 78-1393 (D.C. Cir. Nov. 6, 1978), an officer had been passed over by a temporary selection board which was illegally constituted because it included a member who was junior in rank to the plaintiff. The district court found that the error was harmless because plaintiff was passed over by several subsequent properly constituted boards. While the opinion is not free from ambiguity on this point, it appears that plaintiff's passover by the defectively constituted board was not one of the two passovers upon which separation was based. In our case the error was a component in the passover which resulted in termination, whereas in *Coughlin* the error resulted in the plaintiff's record showing that he had been passed over for promotion when that passover was ineffective. Proper analysis of that plaintiff's case involves the effect the error had on the later passovers with actual pay consequences, and this is a question of material error in a serviceman's record before a board subject to harmless error doctrine. *See Sanders v. United States, supra.* To the extent *Coughlin* differs from this approach and holds that the subsequent process itself demonstrates the harmlessness of the error, this court does not accept it. *See also Dilley v. Alexander, supra,* where the Court of Appeals for the District of Columbia found the presence in officers' records of an illegal passover vitiated a subsequent passover by a properly constituted selection board.

The third type of case is demonstrated by *Knehans v. Callaway,* 403 F. Supp. 290 (D.D.C. 1975), *aff'd,* 566 F.2d 312 (D.C. Cir. 1977), where the courts accepted the recommendation of a standby advisory board as evidence of the harmlessness of the error in the original proceeding. In *Knehans,* the error alleged was a material factual error in the officer's record before a selection board, which is

subject to the harmless error standard. *See Sanders v. United States, supra.* Under regulations, standby advisory boards are authorized only upon the allegation of material error or injustice in an officer's record before a selection board and not for error in the selection process itself. These standby boards differ from reconstituted boards in that they do not attempt to redo the process completely, but instead attempt to compare the officer's correct record with the results of the selection board when the officer was originally considered. We note and agree, however, with the general approach taken by the courts in *Knehans* which made an evaluation of harm without depending on the decision of the standby advisory board as a litmus paper test of the harmlessness of the error. A court must review the board's decision to determine whether it is supported by the evidence. Thus, this case does not support defendant's position.

Under statutes and regulations governing military personnel, an officer is separated or retired when he has been passed over by two selection boards for the same rank. We reaffirm our holding in *Sanders v. United States, supra,* that an officer cannot be terminated under the two-passover rule unless he has had two fair chances at promotion as required by statute and regulation. This includes, in this case, consideration by boards which are constituted squarely in accordance with statute and regulation. This we deem to be an officer's basic right. Where the error is the violation of a provision designed to protect against a general form of prejudice, and there is no way of determining whether actual prejudice was involved in highly subjective and secret decision-making, we conclude that this right was not had. Thus, we hold that plaintiffs' separations, predicated on two passovers by illegally constituted boards, were invalid. These plaintiffs were entitled to their position, rank, and pay until they were terminated from active duty under proper authority.

This conclusion, however, does not mean that these plaintiffs are entitled to recover to the full extent of their claims. We must examine the question of whether the

plaintiffs were properly separated or retired under authority of the regulation upon two passovers by the reconstituted selection boards.

10 U.S.C. § 8297 grants to the Secretary the authority to set up selection boards to recommend promotion. 10 U.S.C. § 1552 grants board powers to the Secretary, acting through correction boards, to correct errors and injustices and to grant appropriate relief. The parties admit, and we conclude, that on the basis of these extensive powers the Secretary had the power to set up new selection boards, out of sequence, to *correct* or *remedy* an admittedly major legal error.

Defendant has taken the extreme position that the reconstituted boards were merely an evidentiary proceeding into the question of harmless error and has failed to consider any other. We feel that this uncompromising attitude jeopardizes the best interests of the Government. Nor do we believe that the facts support defendant's narrow reading of them.

The Secretary, upon the recommendation of the Correction Board, ordered the Chief of Staff to set up new, properly constituted selection boards and required the appropriate correction of the officers' records on the basis of the new boards' recommendations. The character of the process was substantially different from that undertaken by standby advisory boards which make a limited investigation into the question of prejudice in an original proceeding. Here, however, the Secretary ordered that the defective process be redone. We conclude that the label these boards wore is of no importance, the only question being whether plaintiffs received full and fair consideration as required by law.

With one exception noted below, the reconstituted boards followed the identical standards and procedures the original boards had used. The reconstituted boards considered de novo all of the officers in the primary zone the original boards had considered, including both those selected and those rejected for promotion. Each officer's

record was reconstituted as it had been in 1974 and 1975. The reconstituted boards utilized the same instructions and guidelines the Secretary had given to the original boards. Any officer that the reconstituted board had passed over was considered by the second reconstituted board. Each reconstituted board, unlike the original boards, had Reserve membership. The reconstituted boards operated in accordance with all applicable statutes and regulations.[11]

The record does not show how many Reserve officers not selected by the original boards were selected by the reconstituted boards. There is no question, however, that the number was substantial.[12] The Correction Board acted upon the reconstituted selection boards' recommendations for promotion. All of these factors demonstrate that the Secretary made a good faith effort to give all primary zone officers the fair opportunity to be promoted which had not been afforded them by the original selection boards.

Plaintiffs contend, however, that the reconstituted selection boards did not give them a fair opportunity to be promoted because the reconstituted boards did not completely redo the job of the defective boards in that they did not reconsider officers from the secondary zone. Fifteen

[11] Plaintiffs contend that the reconstituted boards could not serve as the basis for separation because such separation would violate AR 635-100, ¶ 3-65*a* (1), which requires that 9 months or more elapse between adjournment dates of temporary selection boards. We do not believe that the regulation was violated because the reconstituted boards had acted on the basis of the records presented to the original boards which had satisfied this requirement.

[12] The plaintiffs in their briefs submitted evidence that "approximately 1203 officers" not originally selected were selected by the reconstituted boards. With respect to the three categories of officers involved in these cases, the plaintiffs' figures indicate that the reconstituted 1974 board selected a minimum of 404 officers whom the original 1974 and 1975 boards had passed over. The defendant's briefs state that the number of officers the original boards had not selected but whom the reconstituted boards had selected were 146 in 1974 and 123 in 1975. Neither side explains these figures any further nor breaks them down between Reservists and Regulars.

percent of the captains and majors and 7½ percent of the chief warrant officers the original selection boards had recommended for promotion were from the secondary zone. This was the maximum permissible number under the regulations that could have been selected from the secondary zone. As noted, this reduced the number of officers selected from the primary zone by the original boards.

Since the reconstituted boards were instructed to and did consider only officers from the primary zone, the total number of officers those boards were to select was reduced by the number of secondary zone officers the original boards had selected. Plaintiffs allege that this change in the number of officers the reconstituted boards could select improperly impinged upon the discretion of selection boards to select less than the maximum permissible number from the secondary zone, and thereby improperly reduced the number of places for which the plaintiffs were competing, and that this disparity between the original and reconstituted boards meant that they did not have a fair opportunity to be promoted.

The facts are unclear and subject to varying interpretations as to the question whether the Secretary impinged upon the discretion of the original selection boards by instructing them to select the maximum complement of secondary zone officers. The Correction Board found that the Secretary did not restrict the discretion of the original boards to select less than the maximum permissible number of secondary zone officers. Pursuant to this finding, since there is no doubt that the reconstituted boards did not have this discretion, there would have been a difference in the manner in which these plaintiffs were reconsidered. There is evidence that at the minimum, however, the Secretary strongly implied by his conduct that he thought the maximum number was the proper number of secondary zone officers who should be promoted by the original boards.[13] As a practical matter, it is highly

[13] The Secretary had abolished the original 1974 captain-to-major temporary selection board before it made its recommendations, because he concluded the low percentage of promotions

unlikely that the reconstituted boards would have selected less than the maximum number of secondary zone officers. But we decline to rest our decision on this conclusion.

Plaintiffs, upon learning of the alleged defects in the 1974 and 1975 selection boards, notified the Secretary and applied to the Correction Board for the correction of their records, showing that they had been promoted by the defective boards[14] or at the minimum that they be retained on active duty until they had the opportunity to be considered by proper selection boards. Based upon the conclusion that there was a compositional error, the Correction Board recommended, and the Secretary adopted, a plan to give plaintiffs an opportunity to be reconsidered for promotion, and, if recommended for promotion, the correction of their records to show that they had been promoted by the original boards.

Since only officers in the primary zone had applied for correction and since only these officers were in the situation that passovers resulted in release from active duty, it is understandable that the Correction Board addressed its remedy only to these individuals. We do not intimate by the above our opinion as to the correctness of this decision as it applied to secondary zone officers. What we find determinative is that plaintiffs were aware from the Correction Board's decision that *only officers in the primary zone would be reconsidered*. No objection was made to the Correction Board or to the courts concerning the manner of reconsideration until the reconstituted selection boards had not recommended the selection of these officers. Indeed, the plaintiffs in the *Adams* case (represented by the same counsel as in *Doyle*) first filed

from the secondary zone that the board was about to announce did not comply with his original instructions to it in that there were many secondary zone officers not selected who were much more highly qualified than primary zone officers who were being selected. The new 1974 captain-to-major selection board (which is one of the "original boards" in this action) then selected the maximum number of secondary zone officers, as did all other original boards involved in this action.

[14] Plaintiffs' claims for promotion are not before the court.

their petition in district court (before transfer) on April 13, 1976, after the decision of the Correction Board but before any action was taken by the reconstituted selection boards. In their petitions, the plaintiffs pled the decision of the Correction Board and attacked it solely on the grounds that the Correction Board had failed to grant them the remedy of reinstatement to their prior rank, back pay, and correction of their records to show that they had not been passed over by the original 1974 and 1975 selection boards. We are convinced that at that time plaintiffs were well satisfied with that part of the remedy which gave them the opportunity to be reconsidered by new selection boards for promotion retroactive to the action of the original selection boards. We conclude that under these circumstances plaintiffs have waived any objection to the manner in which the new boards considered only primary zone officers when they were well aware of this fact and chose not to raise the objection until after they found out they were not recommended for promotion by the reconstituted boards.

It should be kept in mind that 10 U.S.C. § 1552 grants to the Secretary, acting through corrections boards, broad powers to correct and remedy errors and injustices. It is clear that the statute only confers on the Secretary the power to correct records in favor of a serviceman and never against him. Thus, this power does not permit the Secretary to correct these officers' records to show, on the basis of the reconstituted boards' recommendations, that they were passed over by boards with proper Reserve officer membership and, hence, legally separated under the two-passover rule when in fact the original 1974 and 1975 boards did not have proper Reserve officer membership and the officers were not legally separated. Therefore, correction cannot retroactively deprive these officers of the pay and rank to which they were entitled. On the other hand, Congress has conferred on the Secretaries the power to grant remedies exceeding those exercised by us. For example, if the plaintiffs in this case had bypassed the Correction Board and brought the action originally in this

court, while we could order back pay and reinstatement and consideration for promotion in the normal course, we could not have ordered promotion or made any favorable decision of a selection board retroactive. The Secretary could, however, and did, make reconstituted selection boards' recommendations for promotion retroactive.

It has long been part of our law that a party cannot raise an issue on appeal to a court when it failed to raise it before an administrative agency competent to hear it. *See Haynes v. United States,* 190 Ct. Cl. 9, 418 F.2d 1380 (1969). While we have never held that a petition to the Correction Board is a mandatory administrative remedy, we have held that once a party has availed himself of this administrative process he is bound by it unless the decision is unsupported by substantial evidence, arbitrary, capricious, or contrary to law. *Sanders v. United States, supra,* slip op. at 10. A party is not entitled to many independent chances to prevail, and his voluntary choice will often determine the extent of a court's review. Decision-making bodies normally have the power to correct their own errors, *Bookman v. United States,* 197 Ct. Cl. 108, 453 F.2d 1263 (1972), and the Correction Board is no exception. The doctrine that requires that known objections be made to the agency is to insure "that administrative agencies are thereby afforded an opportunity to make adjustments and correct errors on the administrative level, thus permitting the government to mitigate or avoid large damage claims that might otherwise be created (*United States v. Holpuch Co.,* 328 U.S. 234, 239 (1946))." *Blackmar v. United States,* 173 Ct. Cl. 1035, 1045, 354 F.2d 340, 347 (1965). Consonant with this doctrine, plaintiffs are required to voice their objections in such a way that the Secretary or Correction Board is aware of problems, well known to plaintiffs, in the manner a remedy is effectuated before it is effectuated. Plaintiffs could not stand on their objections waiting to see if they were retroactively promoted by the new boards and, only upon the new boards' adverse recommendations, contend that the remedy did not achieve its intended result.

Plaintiffs cannot have their cake and eat it too. Any other rule would not give proper regard to the broad powers of the agency to correct errors, would be wasteful of the good faith effort and expense undertaken by the Secretary in this case, and would not accord with principles of justice.[15]

Therefore, we hold that these plaintiffs did receive full and fair consideration by the reconstituted selection boards. When this was done to remedy the error, the affected officers had everything to which they were thereafter legally entitled, including promotion if so recommended.

This opinion is not to be read as countenancing just any easy process for the Secretary to get around past mistakes. What is crucial to our holding is that the Secretary set up new or fully reconstituted selection boards. Standby or relook boards that do not undertake the exhaustive reevaluation that a normal, regular selection board does do not provide the full and complete opportunity to be fairly and equitably considered for promotion mandated by law.

[15] Our result is slightly different from that reached in *Dilley v. Alexander*. There the court found that the remedy of granting new reconstituted selection boards was inadequate because it did not successfully put the officers "in the same position as they were in before the 1975 Boards convened." *Dilley v. Alexander, supra*, slip op. at 21. The court gave two reasons for this conclusion. The first was that, while plaintiffs were passed over by a validly constituted 1976 board, that board's actions were nevertheless rendered illegal because it had before it the prejudicial fact plaintiffs were nonselected by the illegally constituted 1975 board but did not know of the latter's illegality. This factor has no influence in our case since plaintiffs received two valid opportunities for promotion by new boards. The second reason was that restricting consideration to only primary zone officers materially affected their prospects for promotion. We, however, do not reach that issue because we find that plaintiffs have waived any objection, which grounds were not apparently considered by that court.

III

Plaintiffs assert that the original 1974 and 1975 selection board proceedings were invalid for the additional reason that those boards violated Army regulations in two respects. They also argue that since the reconstituted boards committed the same errors, the decisions of the latter were also invalid. The argument fails because its major premise is unsound: the original boards did not violate the pertinent Army regulations, as discussed below.

The selection boards in this case used the "best qualified" method of selection, under which the board recommends for promotion not more than "a specified number of officers whom they consider the best qualified to meet the needs of the Army of all fully qualified officers in the zone of consideration." AR 624-100, ¶ 18*a*(1). This regulation, promulgated in 1966, required selection boards to categorize each officer they considered as "best qualified," "fully qualified," or "not fully qualified," depending on the rating the boards gave the officer. AR 624-100, ¶¶2*d*, 2*e*, 2*f*. Those best qualified were recommended for promotion. Only the nonselection of those officers found to be not fully qualified was considered a "passover" for separation under the two-passover rule. AR 624-100, ¶¶2*d*, 2*h* 18*a*(1). An officer twice reported by consecutive temporary selection boards as "'not fully qualified' (passed over) for temporary promotion to the same grade will be relieved from active duty under the provisions of AR 135-173 * * *." AR 624-100, ¶ 36. (AR 135-173 was superseded by AR 635-100 in 1969; we shall refer to the superseding regulation.) AR 635-100, ¶ 3-65, provides for the release from active duty of Reservists "who fail a second time to be considered fully qualified, under AR 624-100" for promotion. The nonselection of officers found fully qualified, not recommended for promotion, was not treated as a passover for discharge purposes.

In 1968 and 1970, the Army adopted and widely disseminated so-called message amendments to AR 624-

100, which, however, it did not publish or promulgate as formal numbered changes to the regulation. These amendments were made "pending revision of AR 624-100," and reflected a "change in policy." The first amendment, dated August 14, 1968 (DA Message 876007), provided that officers who were selected were to be categorized as "selected for promotion" rather than best qualified; that officers previously rated fully qualified, not recommended for promotion, were to be rated as "selected for retention in grade"; and that officers previously designated as not fully qualified were to be characterized as "not selected." This amendment also provided that all non-Regular officers twice reported as not selected were to be relieved from active duty pursuant to implementing regulations. *See* AR 624-100, ¶ 36. The 1970 amendment (DA Message 960029) announced that "the following procedures will apply" for temporary promotions: (1) the "selected for retention in grade category is reserved for officers whose records clearly indicate the possibility for future advancement," *i.e.*, officers whose promotions should occur at the subsequent board; (2) officers whom a prior board rated fully qualified, not recommended for promotion, or not selected for promotion will be categorized only as "selected for promotion" or "not selected for promotion."

On May 19, 1975, both AR 624-100 and AR 635-100 (the actual release authority) were changed to provide that Reserve officers not recommended for promotion by two successive boards would be discharged.

Plaintiffs argue that under AR 624-100 as promulgated in 1966 their two nonselections could not be treated as passovers requiring their discharge because the selection boards had not found them "not fully qualified," which under the regulation was the only rating that constituted a passover; that the 1968 and 1970 message amendments were ineffective to change the regulation because only formal numbered changes could do so; that in any event those amendments changed only AR 624-100, which deals with promotions and release from active duty, and did not change AR 635-100, pursuant to which the actual release

takes place; and that the 1975 change in the regulation, which explicitly provided for the release from active duty of Reservists twice not recommended for promotion, cannot be applied retroactively to the proceedings before the original 1974 and 1975 selection boards.[16]

The Correction Board rejected these arguments. It concluded that the May 1975 amendments were not retroactive but "merely clarified and confirmed a long standing Departmental approved policy that an officer who was not selected (recommended) for temporary promotion to the next higher grade would have such non-selection counted towards separation * * * ." It also found that the selection boards considered plaintiffs fully qualified but did not select them for promotion under the best qualified method and that they were thus "twice not selected (recommended) for temporary promotion." Finally, it held that the failure of the Army "to incorporate previously announced approved changes of policy" in formal numbered changes to the regulations did not deny plaintiffs any rights.

The Correction Board's conclusion is not arbitrary, capricious, or unlawful, and we affirm it. The 1968 and 1970 amendments changed Army policy reflected in AR 624-100 to require release of Reserve officers who twice were not selected. Indeed, the 1968 amendment specifically provided that officers twice reported as not selected would be relieved from active duty pursuant to AR 635-100.

Although the 1968 amendment did not explicitly change AR 635-100, it implicitly and necessarily did so. AR 635-100, ¶ 3-65*a*(1), provided for release from active duty of Reservists who twice had been found not "fully qualified, under AR 624-100, for promotion." The latter regulation in turn provided that officers twice passed over would be released from active duty "under the provisions of AR [635-100]." When the Army in 1968 and 1970

[16] The 1975 boards convened in January, March, April, and May 1975.

changed its policy to provide for release of officers who twice had not been selected for temporary promotion, it necessarily also intended to and did make a corresponding change in the companion regulation pursuant to which the actual release from duty took place.

In view of this history, the Correction Board justifiably concluded that the May 1975 change merely clarified and confirmed the Army's long-standing policy that Reserve officers twice not selected for promotion would be released from active duty.

Plaintiffs make a similar contention that the 1974 and 1975 original selection boards selected a larger number of officers from the secondary zone than the regulations permitted. Prior to 1972 the regulations permitted a smaller number of selections from the secondary zone than the 1974 and 1975 boards made. In 1972, however, the Secretary by message amendment (DA Message 202000Z) increased the maximum number for the secondary zone, and in 1974 the successor Secretary approved this amendment. The number of officers the 1974 and 1975 boards selected from the secondary zone was within the limit provided by the 1972 amendment.

Plaintiffs make the same attack upon the 1972 amendment that they do with respect to the qualification categories discussed above: that the amendment of the regulation was ineffective because it was not made by formal numbered change and was not incorporated into later published changes in conformity with regulations governing procedures to be followed in amending Army regulations. The Correction Board rejected these contentions. It held: (1) that the Secretary's 1972 message amendment of the regulation was within his statutory and discretionary authority (*see* 10 U.S.C. § 3442(c)), (2) that his successor's 1974 endorsement of this amendment was also proper, (3) that failure to promulgate the amendment as a formal numbered change did not invalidate it, (4) that the change was clearly intended, widely disseminated and consistently followed as an approved policy and regulatory

change, and (5) that "[w]hile it appears that the Department was remiss in not maintaining the regulation concerned on a current basis, no error or injustice * * * is considered to exist by reason of such failure." The Correction Board's decision is not arbitrary or lacking substantial evidentiary support, and we affirm it.

IV

Plaintiffs further contend that the Secretary denied them equal protection in violation of the fifth amendment by not retaining them on, or restoring them to, active duty while retaining other Reservists who also twice had been denied promotion. Because of our disposition of plaintiffs' claims in their favor on the matter of their entitlement to back pay for the period of their illegal separation, it is, of course, not necessary to reach this final contention and we decline to do so.

CONCLUSION

In summation, we conclude as follows:

(1) The 1974 and 1975 temporary selection boards, considered herein, were illegally composed in violation of 10 U.S.C. § 266 and AR 624-100, ¶ 16*b*(5). This error, upon close analysis of the legislative command, is deemed prejudicial to those officers adversely affected by the action of the boards for the reasons that the statutory command is a clear and unequivocal expression of legislative intent and there is no way of evaluating what impact the error had on the original proceedings. Therefore, plaintiffs' separation predicated on passovers by the 1974 and 1975 selection boards was unlawful, and the Correction Board's refusal to correct their records expunging the passovers, restoring them to active duty, awarding back pay, and putting an explanation in their records explaining the gap therein caused by the illegal separation was arbitrary, capricious, and contrary to law.

(2) The procedure for reconsideration by reconstituted selection boards, afforded plaintiffs by the Correction Board in order to remedy the error, provided plaintiffs

with a fair and complete opportunity to be considered for promotion in the manner intended by statute and regulation. Any objection plaintiffs might have had to the fact that only officers in the primary zone were considered for promotion was waived. The failures to be recommended for promotion by the 1974 and 1975 reconstituted selection boards were valid nonselections under AR 635-100. The Correction Board's attempt to make the nonselections rendered by the reconstituted boards effective as of the action of the original selection boards was arbitrary, capricious, and contrary to law. Therefore, plaintiffs are entitled to have their records corrected to show that they constructively served in the Army from the time of their illegal separation until their release date, 90 days after the Correction Board's decision acting upon the recommendations of the reconstituted selection boards. *See* AR 635-100, ¶ 3-65*a*. Such officers who would have completed 18 or more years of active federal service by this release date are entitled to have their records corrected to show constructive service in accordance with AR 635-100, ¶ 3-65*d*. Plaintiffs are entitled to back pay in accordance with law for periods of constructive service. Plaintiffs who are properly retired rather than separated on account of service, both actual and constructive, are entitled to retirement benefits in accordance with law.

(3) Since it is our understanding that, pursuant to this decision, no plaintiff is *now* entitled to actual restoration to active duty, such claims are denied.

Plaintiffs' motions for summary judgment are granted in part and denied in part in conformity with this opinion. Defendant's cross-motions are similarly granted in part and denied in part. Judgments are entered for plaintiffs and the cases are remanded to the trial division for determination of the amounts of recovery pursuant to Rule 131(*c*). The Secretary of the Army is directed to implement the other relief set forth above and made a part of these judgments.

FRIEDMAN, *Chief Judge,* dissenting in part:

Although I agree with and join in Parts I and III of the court's opinion, I dissent from the holding in Part II that the legal error resulting from the absence of Reservists on the 1974 and 1975 selection boards was not harmless.

The rationale of the court's ruling on this point is that "the doctrine of harmless error cannot be applied to this type of procedural error." I conclude, however, that the doctrine of harmless error may be applied to the legal error committed in this case and that the Correction Board properly concluded — a conclusion the Secretary approved — that in the case of those Reserve officers who were again twice passed over for promotion by the reconstituted selection boards, the absence of Reserve officers on the original selection boards was harmless error.

1. The principle that an error committed by a lower court does not warrant reversal of the court's judgment if the error is harmless is a venerable concept of our jurisprudence. *See* R. Traynor, The Riddle of Harmless Error, 3-17 (1970). The rule is reflected in 28 U.S.C. § 2111,[1] the Federal Rules of Civil and Criminal Procedure,[2] and Rule 153 of the Rules of this court.[3]

As the court notes, the Supreme Court has recognized that even in case of constitutional error occurring in a criminal trial, not every such error requires "the automatic reversal of the conviction"; a conviction will be upheld if the "federal constitutional error . . . was harmless beyond a reasonable doubt." *Chapman v. California,* 386 U.S. 18, 22, 24 (1967). *See, e.g., Harrington v. California,* 395 U.S. 250 (1969) (violation of sixth amendment right of

[1] Section 2111 provides that the judgment of a court of appeals or the Supreme Court shall be rendered "without regard to errors or defects which do not affect the substantial rights of the parties." All 50 states have similar harmless-error statutes or rules. *See Chapman v. California*, 386 U.S. 18, 22 (1967).

[2] Fed. R. Civ. P. 61; Fed R. Crim. P. 52(a).

[3] That rule, entitled "Harmless Error," provides that "the court will disregard any error or defect which does not affect the substantial rights of the parties."

confrontation); *Brown v. United States,* 411 U.S. 223, 231 (1973) (same); *United States v. Parker,* 549 F.2d 1217, 1221 (9th Cir.), *cert. denied,* 430 U.S. 971 (1977) (prosecutor's comment on defendant's failure to testify, in violation of fifth amendment).

Some constitutional rights are "so basic to a fair trial that their infraction can never be treated as harmless error . . . ." *Chapman v. California, supra,* 286 U.S. at 23 (coerced confession, right to counsel, impartial judge). Sometimes the underlying statute itself manifests a congressional intent that no violation may be viewed as harmless error, or the application of the doctrine would be inconsistent with the basic statutory scheme. *See, e.g., Henderson v. United States,* 175 Ct. Cl. 690 (1966) *cert. denied,* 386 U.S. 1016 (1967); *Kotteakos v. United States,* 328 U.S. 750, 764-65 (1946). *Cf.* Note, *Principles for Application of the Harmless Error Standard,* 41 U. CHI. L. REV. 616, 623-24. There may be instances in which the character of the error itself and of the underlying proceedings preclude consideration of whether the error is harmless. *See, e.g., Ryder v. United States,* 218 Ct. Cl. ———, ———, slip op. at 7, 8 (October 18, 1978) (*ex parte* communication in adjudicatory proceeding); *Kotteakos v. United States, supra,* 328 U.S. at 762.

Ordinarily, however, where the error occurs in a civil proceeding and does not rise to a constitutional level, there is room for the application of the harmless error principle.

The error in the present case is statutory, not constitutional. The selection board proceedings are not adjudicatory or accusatory, but evaluational. The error, although serious, was not so far-reaching and did not involve such a departure from basic precepts of fairness as to dictate against even considering whether it substantially prejudiced the plaintiffs. There is no reason why we should refuse to examine whether the original selection boards probably would have reached the same result with respect to the plaintiffs if they had had Reserve members.

The court concludes, however, that our prior decisions in *Ricker v. United States,* 184 Ct. Cl. 402, 396 F.2d 454 (1968), and *Henderson v. United States,* 175 Ct. Cl. 690 (1966), *cert. denied,* 386 U.S. 1016 (1967), preclude application of the harmless error doctrine here. I do not so read them.

As the court points out, *Henderson* involved a board that did not have a quorum because one member of the board was not senior to the person under investigation, in violation of Air Force regulations providing that only members who were senior could sit on the board. The regulations also provided that the seniority requirement could not be waived. The flaw the court found in the proceedings before the *Henderson* board was that the tribunal could not validly function because one of the members necessary to constitute a quorum was disqualified from participating. The absence of a quorum generally renders the action of the body or tribunal void. *See, e.g.,* 2 AM. JUR. 2d, *Administrative Law,* § 196 at 28-29 (1962); *Braniff Airways, Inc. v. Civil Aeronatuics Board,* 379 F.2d 453, 460 (D.C. Cir. 1967). In the present cases, on the other hand, there is no showing that the original selection boards did not have a quorum or that any particular member was disqualified from sitting. Moreover, even assuming that one unidentified member of the original boards was disqualified because he should have been a Reservist, the boards still would have had a quorum without him.[4]

Finally, the unusual prohibition in the regulation in the *Henderson* case against waiver of the requirement that all voting members be senior to the officer under consideration suggests that the Air Force attached such importance to this requirement that any violation thereof necessarily would void the action of the board. There is nothing comparable in the statutory requirement for Reserve members on selection boards that justifies a similar

[4] Five members constituted a quorum; the original boards ranged in size from six to 15 members.

inference. Indeed, the Army itself has recognized the less rigid character of this requirement by providing that Reservists are to be assigned to those boards only where practicable.

In *Ricker* the error in the composition of the board was the improper presence of an officer who was disqualified from sitting under a statute prohibiting a member from sitting on two successive boards to consider officers of the same rank. The court rejected the claim of harmless error on three grounds: (i) the ban against an officer sitting on successive boards may have been intended "to prevent a general form of prejudice," namely the establishment and perpetuation of cliques; (ii) *Henderson* held that the illegally constituted board "rendered the proceedings fatally defective"; and (iii) since the agency violated not its own regulations but an Act of Congress, "[i]t follows, *a fortiori*, that the separations were illegal." 184 Ct. Cl. at 407, 396 F.2d at 456-57.

The claim of harmless error in *Ricker* was not based upon subsequent corrective action by the military that demonstrated a lack of prejudicial error, as here, but upon the nature of the error itself and its allegedly unharmful effect upon the particular proceeding. Moreover, under the government's theory in *Ricker* every violation of the statutory provision would have been harmless error, since officers appear before only one continuation board. As in *Henderson*, the error in *Ricker* was the improper presence of a disqualified officer and not the improper absence of a member with particular qualifications. Finally, although the opinion in *Ricker* does not mention the fact, the continuation board before which the plaintiffs appeared was required to have at least three officers (10 U.S.C. § 5702(a)(1) (1976)); the disqualification of one of the three members of the board, because of his prior service, meant that the board did not have a quorum.

There have been four district court cases that have applied the doctrine of harmless error to the nonselection of Reservists by boards that had no Reserve members.

Dilley v. Alexander, 440 F. Supp. 375 (D.D.C. 1977), *rev'd*, Nos. 77-1789, 77-1790, 77-1791 and 77-1792 (D.C. Cir. Feb. 26, 1979); *Gober v. Alexander*, Civ. No. 77-17-COL (M.D. Ga. Aug. 23, 1977); *Whitehead v. Alexander*, 439 F. Supp. 910, 912 (D.D.C. 1977); *Fuller v. Alexander*, 440 F. Supp. 380, 382 (D.D.C. 1977). The court stresses the court of appeals' reversal of the district court's holding of harmless error in *Dilley*. In doing so, however, the court of appeals in *Dilley* stated (slip op. at 21):

> This case would be considerably different had the Relook Boards been normal promotion selection boards merely masquerading under a new label. Despite the Relook Boards' misguided charter, if the Army had successfully placed the appellants in the same position as they were in before the 1975 Boards convened, then the procedural defect would have been repaired and appellants would have no cause to complain. The Army did not completely "reconstitute" that setting, however, and we regard its failure to do so in two important respects as critical to our holding in this case.

The two respects in which the court held that the reconstituted boards were defective for purposes of determining harmless error were (1) that prior to the action of the reconstituted board, the officers involved had been passed over by a second selection board, which had before it the record of the officers' improper passovers by the first improperly constituted board, and (2) that because the reconstituted boards considered only candidates from the primary zone, the officers' opportunity for promotion by the reconstituted boards was seriously weakened. The first situation did not exist in the present case. As we show below, the second objection does not negate the finding of harmless error here.

The *Dilley* case did not hold that harmless error can never be found in this type of illegality; it held only that on the facts of that particular case the error was not harmless. Moreover, it is far from clear that the *Dilley* court would have refused to sanction the ruling of the

Correction Board that the error here was harmless. Indeed, the opinion in *Dilley* at least suggests that the District of Columbia Circuit might well have upheld the board's action in this case.

In addition to the four district court decisions that have held the absence of Reservists on the original selection boards to be harmless error, there have been decisions that have applied the harmless error doctrine to other situations involving military boards, including the claim that the board was improperly consitutued. In *Coughlin, v. Alexander,* 446 F. Supp. 1024, 1027 (D.D.C. 1978), *aff'd,* No. 78-1393 (D.C. Cir. Nov. 6, 1978), the fact that a temporary selection board was illegally constituted because it included a member who was junior in rank to the plaintiff was held harmless error because plaintiff was passed over by several subsequent properly constituted boards. In *Knehans v. Callaway,* 403 F. Supp. 290 (D.D.C. 1975), *aff'd,* 566 F.2d 312, 314 (D.C. Cir. 1977), the presence of invalid officer efficiency report and the omission of several complimentary letters from plaintiff's record was held not automatically to invalidate plaintiff's selection out. In *Bensing v. United States,* 551 F.2d 262 (10th Cir.), *cert. denied,* 434 U.S. 832 (1977), an error in recordation of the promotion list service date that required earlier board consideration did not automatically invalidate plaintiff's nonselection. *Cf. Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274 (1977) (substantive constitutional defect in employment separation context did not require automatic reinstatement and back pay).

The court discusses these cases in detail, drawing subtle distinctions between them and the present cases. Of course, the cases are distinguishable. I cite them only to show that there has been repeated judicial acceptance and application of the doctrine of harmless error in reviewing the actions of a myriad of military tribunals in situtations where the issues the tribunal decided and the nature of the errors it committed were not so different in kind or degree

from the error here committed as to call for a different result in these cases.

2. I agree with the Correction Board that the absence of Reservists on the original 1974 and 1975 selection boards was harmless error.

Except for limiting consideration to officers in the primary zone, discussed below, the reconstituted boards followed the identical standards and procedures the original boards had used. The reconstituted boards considered *de novo* all the officers in the primary zone the original boards had considered, including both those selected and those rejected for promotion. Each officer's record was reconstituted as it had been in 1974 and 1975. The reconstituted boards utilized the same instructions and guidelines the Secretary had given to the original boards. Any officer the first reconstituted board passed over was considered by the second reconstituted board. Each reconstituted board, unlike the original board, had Reserve membership.

The record does not show how many Reserve officers not selected by the original boards were selected by the reconstituted boards. As the court notes, the number was substantial. None of the plaintiffs was selected by either the original boards which contained no Reservists, or by the reconsituted boards which had Reservists. Considering all of the circumstances, the Correction Board properly concluded that it was "reasonable to presume that had [the plaintiffs] been considered by properly constituted boards, they would not have been selected for promotion," and that the absence of Reservists on the original selection boards was harmless error with respect to the plaintiffs.

The concept of harmless error deals with probabilities, not certainties. It never can be stated with certainty that an error made no difference in the tribunal's decision. Yet that is what the court seems to be requiring when it offers as a reason for rejecting the concept of harmless error "that it is not possible for a reviewing body to determine what effect the error had on the judgment of the original

proceeding." The rule of harmless error does not require such certainty; if it did, it would virtually never apply.

Plaintiffs contend that the proceedings before the reconstituted selection boards did not provide a fair basis for evaluating the effect the absence of Reservists on the original boards had upon Reservists denied promotion, because the reconstituted boards did not consider officers from the secondary zone. Fifteen percent of the captains and majors and 7½ percent of the chief warrant officers the original selection boards recommended for promotion were from the secondary zone. This was the maximum permissible number under the regulations, and the number the Secretary of the Army had indicated to those boards would be appropriate. *See* note 5, *infra*. As the court notes, this reduced the number of officers selected from the primary zone.

Since the reconstituted boards were instructed to and did consider only officers from the primary zone, the total number of officers those boards were to select was reduced by the number of secondary zone officers the original boards had selected. Plaintiffs allege that this change in the number of officers the reconstituted boards could select improperly impinged upon the discretion of selection boards to select less than the maximum permissible number from the secondary zone, and thereby reduced the number of places for which the plaintiffs were competing; and that this disparity between the original and reconstituted boards meant that the plaintiffs' nonselection by the reconstituted boards was not a fair indication of the likelihood that they would not have been selected had the original boards contained Reservists.

The Secretary had indicated to the original boards that he wanted them to select the maximum number from the

secondary zone, and they did so.[5] There is no reason to believe that if the reconstituted boards had been directed to select the same number of officers the original boards had selected and to draw them from both zones, the reconstituted boards also would not have taken the maximum number from the secondary zone. The reconstituted boards presumably were aware of the Secretary's action with respect to the original 1974 captain-to-major board (*see* note 5, *supra*). Thus, plaintiffs would be most unlikely to have benefitted from the procedure they believe the reconstituted boards should have followed. This is particularly so since officers selected from the secondary zone are better qualified than those from the primary zone. There seems little likelihood that the plaintiffs, all of whom were passed over by both reconstituted boards, would have been selected by those boards in preference to secondary zone officers if the latter were under consideration.

(Opinion filed May 16, 1979)

[5] The Secretary had abolished the original 1974 captain-to-major temporary selection board it made its recommendations, because he concluded that the low percentage of promotions from the secondary zone that the board was about to announce did not comply with his original instructions to it. The Secretary appointed a new board and instructed it to select "the maximum number of officers from the secondary zone," and the new board did so (15 percent). Plaintiffs unsuccessfully challenged before the Correction Board both the Secretary's abolition of the original board and the instructions to the new board as an impermissible restriction of the board's discretion, but they do not renew that contention here. In any event, I think that the Secretary acted within his broad discretion over military personnel (*cf. Orloff v. Willoughby*, 345 U.S. 83 (1953)) in taking those actions.

In The United States Court of Claims

No. 131-77

Major Leo D. Doyle, et al.

v.

The United States

No. 275-77

Major Joe L. Adams, et al.

v.

The United States

Robert M. Wright, attorney of record, for plaintiffs. *Keith A. Rosenberg,* of counsel.

George M. Beasley, III, with whom was *Assistant Attorney General Barbara Allen Babcock,* for defendant.

Before FRIEDMAN, *Chief Judge,* DAVIS, NICHOLS, KASHIWA, KUNZIG, BENNETT, and SMITH, *Judges, en banc.*

ORDER

The court is presented with plaintiffs' motion of June 13, 1979, for rehearing and clarification of the opinion of May 16, 1979. As to clarification, plaintiffs make reference to a statement on page 31 of the slip opinion that plaintiffs are entitled to a correction of records—

> "* * * to show that they constructively served in the Army from the time of their illegal separation until their release date, 90 days after the Correction Board's decision acting upon the recommendations of the reconstituted selection boards. *See* AR 635-100, ¶ 3-65*a*."

The foregoing statement was based upon the regulation cited which more specifically refers to the release from active duty as "on the 90th day after receipt of involuntary release notification." Plaintiffs properly assume the court meant what the regulation says and request that the court clarify whether any time is to be allowed from the date of the notice letter, December 16, 1977, "for presumed delivery to the individual concerned in the ordinary course of the mail." Defendant has failed to respond to plaintiffs' request for clarification.

No evidence has been given to the court to show when notice was actually received by any of the plaintiffs or whether they in fact signed any acknowledgment of receipt of notice. We do not know if notices were all received at the same time or whether they were received at different times. We have been shown no authority for allowing time for presumed delivery of notice. Accordingly,

IT IS HEREBY ORDERED that the motion for clarification is granted as follows:

The sentence referred to above on page 31 of the slip opinion is amended to read:

> "* * * to show that they constructively served in the Army from the time of their illegal separation until their release date on the 90th day after receipt of involuntary release notification. *See* AR 635-100, ¶ 3-65*a*."

IT IS FURTHER ORDERED that the trial judge to whom the court remanded the case pursuant to Rule 131(c) may consider the representations of the parties in computation of the damages and make such findings as the proof, authorities, regulations, or stipulations may necessi-

tate on the issue of the time of receipt of the notice specified in the regulation.

IT IS ALSO ORDERED that plaintiffs' motion for rehearing is denied as being without merit.

By The Court

DANIEL M. FRIEDMAN,
Chief Judge.

(Filed September 28, 1979)

In The United States Court Of Claims

Military pay; stipulated measure of relief, amendment of opinion

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No. 131-77 — Major Leo D. Doyle, et al.

No. 275-77 — Major Joe L. Adams, et al.

v.

The United States

Robert M. Wright, attorney of record, and *Keith A. Rosenberg,* of counsel, for plaintiffs.

George M. Beasley, III, with whom was *Acting Assistant Attorney General Alice Daniel,* for defendant.

Before FRIEDMAN, *Chief Judge,* DAVIS, NICHOLS, KASHIWA, KUNZIG, BENNETT, and SMITH, *Judges, en banc.*

ORDER

(Filed November 30, 1979)

These cases come again before the court, this time on plaintiffs' motion, filed October 16, 1979, for correction of the May 16, 1979, opinion of the court, as amended by its order of September 28, 1979, and defendant's reply of October 30, 1979, to the motion and its own cross-motion for correction of the opinion, as amended.

We find no merit in plaintiffs' motion. However, defendant now alleges that the order of the court of September 28, 1979, which was intended to conform with Army regulations, does not in fact adequately achieve the purpose intended by the opinion. Defendant says that the parties have agreed upon the dates when those officers, who were retained on active duty pending the results of the relook boards, were released from active duty. Plaintiffs acknowledge this to be true. As all plaintiffs fall into one of the categories covered by the stipulated dates, the application of these agreed upon release dates to plaintiffs will result in their being placed in the same position they would have been had they been retained on active duty pending the results of the relook boards. In other words, the court, in its opinion of May 16, 1979, determined that plaintiffs' release dates should be adjusted forward and that such forward adjustment should include credit for an additional 90-day "constructive notice" period. All that is required is to determine when plaintiffs would have been released from active duty had they been retained on active duty pending the results of the relook boards.

Accordingly, since the parties have agreed on these issues,

IT IS HEREBY ORDERED that plaintiffs' motion for correction is denied. Defendant's cross-motion is granted, and the opinion is amended to show that:

(1) each of the plaintiffs in the grade of major is credited with constructive active duty from his original release date until his new release date on March 31, 1977;

(2) each of the plaintiffs in the grade of captain is credited with constructive active duty from his original release date until his new release date on February 28, 1977;

(3) each of the plaintiffs in the grade of chief warrant officer is credited with constructive active duty from his original release date until his new release date on January 31, 1977;

(4) such of the plaintiffs who would have completed 18 or more years of active federal service by the new release date are entitled to have their records corrected to show constructive service in accordance with AR 635-100, ¶ 3-65*d*.

By The Court

DANIEL M. FRIEDMAN,
Chief Judge.

(Filed November 30, 1979)